Supreme Court, U.S.

No. 01 348 AUG 17 2001

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In the
SUPREME COURT OF THE UNITED STATES

JOE CARRABBA, JR., ET AL.,
Individually and on Behalf of
All Others Similarly Situated, *Petitioners*,

v.

RANDALLS FOOD MARKETS, INC., *Respondent*.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

Where a court determines that an ERISA plan contains illegal terms, may that court nevertheless apply those illegal terms when determining a plan participant's claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B)?

PARTIES TO THE PROCEEDINGS BELOW

Appellants/Cross-Appellees/Plaintiffs:

Joe Carrabba, Jr., Joe Melton, Craig McKnight, Robert H. Burrows, Barbara A. Williams, Loyd Wellesley, Willard P. Correll, Bruce Philpot, J Bruce Gray, Rick Williams, A. Joe Cutrer, Roberto G. Fernandez-Vinas, Thomas D. McCarthy, Wylie Holmes, Dave Cooper, Ed Fortner, Jack D. Neal, Floyd E. Fulcher, Jack W. Sprabary, Robert L. Stockton, Carroll E. Brown, Michael J. Hammer, Scott E. Peterson, William H. Mansfield, James S. Standifer, Bettie J. Garrett, Cherie J. Stowe, Arvil R. Martin, Sanford W. Maynard, Denise P. Miller, Everett G. Grosgebauer, Gregory E. Smith, Michael Chessmore, Ima Dell Irvin, all individually and on behalf of all others similarly situated.

Appellee/Cross-Appellant/Defendant:

Randalls Food Markets, Inc.

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OPINIONS AND JUDGMENTS BELOW

A separate appendix to this petition contains the opinions that the courts below issued. The opinions are as follows:

Carrabba v. Randalls Food Markets, Inc., 38 F. Supp. 2d 468 (N.D. Tex. 1999) (liability)

Carrabba v. Randalls Food Markets, Inc., 145 F. Supp. 2d 763 (N.D. Tex. 2000) (relief)

Carrabba v. Randalls Food Markets, Inc., 252 F.3d 721 (5th Cir. 2001)

JURISDICTION

The court of appeals entered its judgment on May 22, 2001. No party filed a petition for rehearing. This Court's jurisdiction to review the court of appeals' judgment arises from 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C.A. § 1002(19) (West 1999):

The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contribution shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3) [29 USC § 1053(a)(3)].

29 U.S.C.A. § 1002(21)(A) (West 1999):

(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1) of this title.

29 U.S.C.A. § 1002(23)(A) (West 1999):

The term "accrued benefit" means—
(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [29 USC § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age.

29 U.S.C.A. § 1104(a)(1)(D) (West 1999):

Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

. . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C.A. § 1132(a)(1) (West 1999):

A civil action may be brought—

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

STATEMENT OF THE CASE

The petitioners were the plaintiffs below. They worked for a supermarket chain owned and operated by Randalls Food Markets, Inc., and participated a company sponsored ERISA pension plan. When Randalls terminated the plan, it invoked illegal plan provisions to forfeit retirement benefits the plan had promised.

The district court agreed that Randalls had wrongfully forfeited plaintiffs' retirement benefits, but in determining the type of relief to award, the court used the same plan provisions it had held were illegal to deny plaintiffs' claim for benefits under 29 U.S.C. § 1132(a)(1)(B). When the Fifth Circuit affirmed this decision on appeal, it created a conflict with Third Circuit law and also sanctioned a departure from this Court's own mandate that ERISA plan participants receive what they've been promised in the way of retirement benefits.

A. The ERISA Plan and Its Termination.

Originally, the plaintiffs worked for and the plan was administered by Cullum Companies, Inc. ("Cullum"). Cullum had created the plan as a so-called "top hat" plan, i.e., a plan that "is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C.A. §§ 1051(2), 1081(a)(3), 1101(a)(1) (West 1999). "Top hat" plans are intended for high-level employees

whose bargaining power alleviates the need for ERISA protection, so ERISA excludes such plans from the normal requirements regarding funding, reporting, disclosure, and nonforfeitability of benefits. *See Spacek v. Maritime Ass'n ILA Pension Plan*, 134 F.3d 283, 290 (5th Cir. 1998).

Despite ERISA's expressed intent that "top hat" plans be limited to this select group of high-level employees, over the years Cullum invited employees at nearly all employment levels to participate in the plan. Thus, in addition to some of its top management, Cullum included hourly and non-managerial employees such as stockers, secretaries, bakers, clerical employees, an executive chef, mechanics, security guards, butchers, maintenance workers, and even a chauffer.

Over the years, Cullum distributed plan agreements, benefit statements, brochures, and other materials to the plan participants, promising them substantial benefits if they remained employed with Cullum until retirement. However, because it was purportedly a "top hat" plan, Cullum's ERISA plan—referred to in the record as the Management Security Plan or "MSP"—did not include any ratable vesting or accrual schedules and instead contained an illegal forfeiture provision. That is, the plan stated that all the promised benefits were forfeitable if the plan was terminated or the participant ceased to be an employee before retirement. This provision, while permissible in a "top hat" plan, violates 29 U.S.C. § 1002(19) (defining nonforfeitable benefits), § 1053(a) (minimum vesting

standards), and § 1054 (minimum accrual rate tests) and is therefore illegal in ERISA pension plans.

Shortly after Randalls bought Cullum, it terminated the plan and paid out minimal benefits to the plan participants, in sums far below what the plan promised, excluding its illegal terms. Approximately half of the participants received merely the amount they contributed to the plan, without interest.

B. Proceedings Below.

The plaintiffs filed a class action in U.S. District Court and sought to recover on behalf of all the ERISA plan participants the retirement benefits that Randalls had forfeited when it terminated the plan. The lawsuit invoked 29 U.S.C. § 1132(a)(1)(B), so the district court had jurisdiction under 28 U.S.C. § 1331.

The district court certified a class composed of plan participants (or their beneficiaries) employed by Randalls when it terminated the plan. Following a trial before the court, the court issued a written opinion and held that the plan was *not* an ERISA "top hat" plan and thus was not exempt from ERISA's nonforfeiture, vesting, accrual, reporting, disclosure, and funding requirements. *Carrabba v. Randalls Food Markets, Inc.*, 38 F. Supp. 2d 468, 478 (N.D. Tex. 1999).

The district court then re-certified the class for all remaining issues (29 R. 7035-44). After conducting a damages trial, the court issued another written opinion granting relief. *See Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763 (N.D. Tex. 2000). The court

concluded that "the Class did not receive the financial benefits they should and would have received upon termination of the plan in 1992 if the plan sponsor had recognized that the MSP was subject to the accrual and vesting requirements of ERISA and had acted accordingly." *Id.* at 766. The court opined that, because Cullum had drafted the plan as a "top hat" plan rather than a standard ERISA plan, the plan "lacked the vesting and accrual provisions mandated by ERISA." *Id.* at 768.

Nevertheless, the court declined to grant plaintiffs a recovery of plan benefits pursuant to 29 U.S.C. § 1132(a)(1)(B), which creates a breach of contract type remedy, and decided instead to grant recovery under section 1132(a)(3)(B), which gives the court *equitable* power to fashion appropriate relief for a violation of ERISA. The court refused to award the plaintiffs the present value of the benefits that the plan's lawful terms had promised. The court reasoned: "If recovery under the terms of the MSP were the nature of plaintiffs' action, they would recover very little because there is no evidence that upon termination of the MSP they did not receive basically everything to which they were entitled *under the provisions of the MSP*." 145 F. Supp. 2d at 770 (emphasis added). In so holding, the court refused to address ERISA's mandate expressed in 29 U.S.C. § 1104(a)(1)(D) that plan fiduciaries (and thus reviewing courts) must ignore illegal terms in ERISA plans and enforce those plans as though the illegal terms never existed.

In short, the court held (without citing any supporting authority) that in awarding plan benefits

under section 1132(a)(1)(B), a court must construe the terms of a plan as written, including terms that violate ERISA. The court concluded that because the illegal clause authorized forfeiture of promised benefits, a section 1132(a)(1)(B) award of benefits would not include the forfeited benefits.

The plaintiffs had requested approximately $47.3 million, the unpaid present value of the $180 million in benefits that the plan had promised. The district court instead awarded the class $6.7 million as equitable relief, pre-judgment interest on that amount, and attorneys' fees. The award regarded all plaintiffs as fully vested and was calculated using a hypothetical accrual method that theoretically could have been but never was adopted by Cullum or disclosed to the participants.

In effect, the court allowed Randalls to retroactively create a new plan specifically designed to produce the least generous accrual method allowed under ERISA and acted as if the plaintiffs had consciously and voluntarily participated in this hypothetical plan in making their retirement decisions. The court acted as if Cullum had provided the plaintiffs with benefit statements relating to the hypothetical plan, had qualified the hypothetical plan for tax purposes, had properly funded the plan, and had made appropriate disclosures and reports during the life of the plan.

On appeal, the plaintiffs argued that in assessing a claim for pension benefits courts should ignore illegal plan provisions and enforce the remaining plan terms

and award benefits according to the plan's remaining legal terms and according to other applicable ERISA mandates. Ignoring the illegal forfeiture provision and pursuant to ERISA's express requirements, plaintiffs' promised benefits were accrued at plan termination, there being no lawful accrual limitations in the plan as a condition to receipt of the promised benefits. Thus, the appropriate relief was the present value of the promised benefits at plan termination based on the lawful plan provisions.

However, the court of appeals in a *per curiam* opinion affirmed the district court without writing its own opinion. *Carrabba v. Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001). Rather, the court expressly affirmed the district court "based on that court's conscientious, well-reasoned opinions, which will be published." *Id.* at 771-72. In short, the court of appeals adopted the district court decision as a correct statement of ERISA law. In doing so, the Fifth Circuit ignored ERISA's express provisions, created a direct conflict with Third Circuit law, and ignored this Court's mandate.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's Treatment of Illegal ERISA Plan Terms Ignores ERISA and Conflicts With Third Circuit Law.

ERISA provides in 29 U.S.C. § 1104(a)(1)(D) that ERISA fiduciaries (and thus courts reviewing a fiduciary's conduct) are to discharge their duties regarding a plan "solely in the interest of the participants and beneficiaries and—(D) in accordance with the documents and instruments governing the plan insofar as such documents are instruments are consistent with the provisions of this title [ERISA]."

In *Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985), the Third Circuit Court of Appeals addressed the specific application of section 1104(a)(1)(D) to a claim for benefits due under an ERISA plan. The Fifth Circuit decision in the present case specifically contradicts this Third Circuit decision. Moreover, the Fifth Circuit decision contradicts similar ERISA cases regarding what to do with illegal plan provisions in assessing the propriety or amount of relief in an ERISA case and conflicts with section 1104(a)(1)(D) itself.

The issue in *Northeast Department ILGWU Health & Welfare Fund* was the effect of competing "other insurance" provisions in separate ERISA plans, both of which purported to cover the employee's medical costs. One provision was an "excess clause" while the other was an "escape clause" providing that the plan

fiduciary could deny all insurance coverage to a participant covered by a spouse's group insurer if the spouse had paid for less than 50% of the cost of that coverage. The Third Circuit held that the escape clause violated ERISA. Accordingly, the court ignored the escape clause and determined the employee's plan benefits without reference to it: "In the absence of its escape clause, the ILGWU plan is the primary insurer of Mrs. Fazio's medical expenses . . ." *Id.* at 163-64.

The Fifth Circuit decision in the present case conflicts directly with the Third Circuit. Confronted with an illegal forfeiture provision in an ERISA plan, the Fifth Circuit gave effect to the illegal provision and accordingly denied the plaintiffs a section 1132(a)(1)(B) claim for plan benefits in the present value of what the plan had promised them at retirement. Confronted with this same issue, the Third Circuit, upon holding the illegal provision unenforceable, followed the language of ERISA and gave the illegal provision no effect when the court determined the claim for plan benefits.

In addressing the effect courts should give to illegal terms in ERISA plans in other contexts, courts have repeatedly concluded that the illegal terms should have no effect. Plan administrators simply cannot hide behind documents that are inconsistent with ERISA. *Gruby v. Brady*, 838 F. Supp. 820, 829 (S.D.N.Y. 1993). Rather, they must ignore illegal plan terms when construing the plan. *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995); *Air Line Pilots Ass'n Int'l v. Delta Air Lines, Inc.*, 863 F.2d 87, 96 (D.C. Cir. 1988); *Ches v. Archer*, 827 F. Supp. 159, 165 (W.D.N.Y. 1993); *Arakelian*

v. National Western Life Ins. Co., 755 F. Supp. 1080, 1084 n.3 (D.D.C. 1990).

A review of *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421 (M.D. Ala. 1990), which also involved a failed "top hat" plan, illustrates this approach. Because there was no plan document in that case, the court had to first determine the amount of promised benefits and then calculate the present value of what had been promised. In doing so, the court expressly rejected the employer's argument that it should be allowed to create a new plan that would have reduced the employer's liability to less than what had already been promised. Rather, the remedy was the present value of the promised benefit. *Id.* at 1426.

The Fifth Circuit decision in the present case conflicts with *Hollingshead* by essentially permitting the employer to include an illegal forfeiture provision in a plan, terminate the plan and forfeit benefits, and when a claim for benefits is made, rewrite the plan and pay the participants a small fraction of the amounts they had been promised.

This ruling thwarts the purpose of ERISA (to protect the expectation of promised retirement benefits) and gives employers incentives to violate ERISA with impunity. Simply adding an illegal forfeiture provision to an ERISA plan allows employers to avoid any claim for benefits by adopting a new plan (even post-termination) containing reduced retirement benefits and terms not previously disclosed to the plan participants. This is why ERISA and all other opinions establish that illegal terms are unenforceable and that a

plan must be given effect without reference to its illegal provisions.

B. The Fifth Circuit Decision Violates Critical ERISA Principles This Court Has Affirmed.

The Fifth Circuit's decision also violates principles this Court established in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985). In *Central States* this Court reiterated the policy concerns behind ERISA: to protect the continued well-being and security of employees and their dependents directly affected by ERISA plans. One of ERISA's principal purposes is to ensure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain the vested benefit—he actually will receive it. 472 U.S. at 569. In the present case, the plaintiffs satisfied the lawful conditions for receipt of their benefits. They are thus entitled to the present value of their promised benefits.

This Court recognized in *Central States* that ERISA's reporting and disclosure standards require benefit plans to furnish all participants with documents informing them of their rights and obligations under the plan. *Id.* at 572. This includes benefit statements showing their benefits at retirement. The Fifth Circuit decision in the present case errs because it awards benefits based on a hypothetical plan that the company never disclosed to the plaintiffs and that substantially reduced the retirement benefits previously promised by the lawful terms in the plan documents and benefit

statements that the company had distributed to the plaintiffs during their employment.

Applying the principles of *Central States*, the plaintiffs did not receive what they were promised, despite the fact that they satisfied the necessary conditions. To induce the plaintiffs to enroll in the plan and remain employed, Cullum distributed brochures describing the plan as "A Financial Guarantee for the 1980's and Beyond." Cullum described the plan as a way to provide for "your family's financial security." Cullum told the plaintiffs they were making an investment in the plan and that their benefits would exceed what they could accumulate in a 401(k) or IRA. Long-term participants received dozens of documents promising specific retirement benefits at age 65 so long as they remained employed and participated in the plan.

In the end, Cullum received what it bargained for—a loyal and seasoned work force—and when Randalls took over it received a windfall: it was able to terminate the plan and pay pennies on the dollar compared to what the plan's lawful terms promised.

Thus, the plaintiffs gave the company loyalty and voluntary participation in the plan, but instead of receiving the present value of what they had been promised, they were denied the protections Congress intended that they receive. Under the Fifth Circuit decision, then, employers are free to promise generous benefits, obtain loyalty from their employees based on these promises, then apply illegal forfeiture provisions to deny benefits, and the employer's only exposure will

be for the present value of the smallest benefit amounts the employer could have hypothetically promised.

C. The Fifth Circuit Decision Erroneously Gave Effect to Illegal Terms to Deny the Section 1132(a)(1)(B) Claim for Benefits.

Section 1132 of the ERISA statute as codified authorizes relief in the form of accrued benefits due under a plan. 29 U.S.C.A. § 1132(a)(1)(B) (West 1999); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987). Courts awarding benefits under ERISA section 1132 should ignore plan terms that violate ERISA.

First, section 1132 "creates a procedural mechanism for enforcing a plan participant's rights, whether predicated upon ERISA's statutory protections or upon the federal common law of contracts." *Spacek v. Maritime Ass'n ILA Pension Plan*, 134 F.3d 283, 287 (5th Cir. 1998). Illegal forfeiture provisions cannot abrogate the rights that section 1132(a)(1)(B) creates.

Second, ERISA embodies the common law of trusts, which applies to the extent compatible with ERISA. *See Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). At common law, courts enforcing an otherwise valid trust omit invalid terms as if they do not exist. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 211, at 131 (1992); *see In re Goff*, 812 F.2d 931, 933 (5th Cir. 1987). ERISA codifies this principle by requiring that a fiduciary must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such

documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C.A. § 1104(a)(1)(D) (West 1999).

As the plan's fiduciary (21 R. 5008), Randalls had a duty to apply only those parts of the plan that comply with ERISA—and ignore any illegal provisions. *See Central States, Southeast & Southwest Areas Pension Fund*, 472 U.S. at 568 (concluding that "trust documents must generally be construed in light of ERISA's policies . . ."). Although the decision to terminate a plan does not involve a fiduciary duty, discretionary conduct implementing that decision does. *Waller v. Blue Cross of California*, 32 F.3d 1337, 1342 (9th Cir. 1994).

Here, Randalls had the discretion to determine the plaintiffs' benefits and admittedly made a "discretionary determination" of the amounts due them (Agreed Ex. 3, ¶ 13.7; 5 R. 1029; 1038-39). Therefore, ERISA required Randalls to ignore the illegal terms when calculating the plaintiffs' benefits.

Third, when one sets aside the plan's illegal terms, the benefits stated in the plan summaries and benefit statements Cullum distributed are fully accrued and nonforfeitable. ERISA requires pension plans to provide for nonforfeitable retirement benefits. 29 U.S.C.A. § 1053(a), (b) (West 1999). ERISA defines nonforfeitable benefits as promised benefits that are not subject to a lawful condition:

> The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his

> beneficiary to that part of an immediate or deferred benefit under a pension plan that arises from the participant's service, *which is unconditional*, and which is legally enforceable against the plan.

29 U.S.C.A. § 1002(19) (West 1999) (emphasis added). Because the plan does not limit plaintiffs' promised benefits with a lawful condition, such as a lawful accrual method, they are nonforfeitable as a matter of law. 29 U.S.C.A. §§ 1002(19), 1053(a), (b) (West 1999).

Additionally, the promised benefits were fully accrued under ERISA, which provides:

> The term "accrued benefit" means - (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age.

Id. § 1002(23)(A) (West 1999). The plan is a defined benefit plan because the promised benefits are stated as a specific amount and those amounts are not based solely upon the amount contributed to the participant's account and any income, expenses, gains, losses, and forfeitures of other participants' accounts that may be allocated to a participant's account. *Id.* § 1002(34), (35) (West 1999); *see Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 911 (M.D. Ala. 1992).

The plan's lawful terms thus unconditionally promise 100% of a specific pension benefit as an annual benefit commencing at retirement (Agreed Ex. 3 at ¶

4.1, Annex I at ¶ 3). An accrual method that complies with ERISA is a lawful condition that limits the rate at which a participant becomes entitled to his or her promised benefit. Accordingly, the promised benefits were 100% accrued under the plan's lawful terms. 29 U.S.C.A. § 1054(a), (b) (West 1999).

For example, the plan's accrual provisions have two parts. First, the plan gives a specific benefit unreduced by a lawful accrual method. Then the plan purports to eliminate the accrued benefits the first part creates. When one sets aside the second part, the first remains and is the benefit due. If the plan had said, "You will receive at retirement $1,000,000 payable in 120 monthly installments, which amount accrues 20% per year," and elsewhere said, "Notwithstanding what we said previously, no benefits accrue until the day you retire," upon the court declaring the second clause illegal, Randalls could not impose a new accrual method. The $1,000,000 is fully accrued after five years.

The same result applies here where the plan first promised a benefit and then purported to take it away. Moreover, because ERISA requires that, "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," 29 U.S.C.A. § 1102(a) (West 1999), if the accrual conditions are not stated in the plan they do not exist, and the defined benefit is unconditional and nonforfeitable. Here, the plan's lawful terms do not limit plaintiffs' promised benefits with a lawful accrual condition, and so the benefits are unconditional and nonforfeitable.

Over the years, the employer promised in the plan agreements, benefit statements, and numerous other plan summaries provided to the plaintiffs approximately $180 million worth of retirement benefits. None of the documents sets forth any lawful limitation, in the form of a ratable accrual method, on the plaintiffs' rights to benefits. Cullum's statements thereby created nonforfeitable benefits that, but for the illegal forfeiture provisions in the plan, were vested, accrued benefits. The benefits were unconditional and expressed in the form of an annual benefit commencing at normal retirement age (Agreed Exs. 90, 92; 38 R. 9376-89). *See* 29 U.S.C.A. § 1102(23)(A) (West 1999); *Spacek*, 134 F.3d at 290. Thus, the benefit amounts stated in the benefit statements were fully accrued as of plan termination date. The present value of these amounts is recoverable under section 1132(a)(1)(B). The Fifth Circuit erred in denying these benefits.

Because plaintiffs have a valid remedy under 29 U.S.C. § 1132(a)(1), the Fifth Circuit erred by resorting to 29 U.S.C. 1132(a)(3)(B) to provide "other appropriate equitable relief." *Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996); *Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999); *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 610-11 (5th Cir. 1998).

CONCLUSION

Although plaintiffs' arguments involve merely a straightforward application of ERISA and the cases construing 29 U.S.C. § 1104(a)(1)(D) to the lawful terms of the plan, neither the trial or appellate court explained its rationale for rejecting these arguments and holding that the plan's illegal terms were enforceable to defeat plaintiffs' claim under 29 U.S.C. § 1132(a)(1)(B). Because the Fifth Circuit's holding conflicts with the Third Circuit's holding on this critical issue under an important federal statute—and violates critical ERISA principles this Court has affirmed—the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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Supreme Court, U.S.
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No. _____

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JOE CARRABBA, JR., ET AL.,
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All Others Similarly Situated, *Petitioners*,

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RANDALL'S FOOD MARKETS, INC., *Respondent*.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10520

JOE CARRABBA, JR., ET AL,

Plaintiffs-Appellants-Cross-Appellees,

vs.

RANDALLS FOOD MARKETS, INC.,

Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

May 22, 2001

Before JONES, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

The court has carefully considered this appeal in light of the excellent briefs, oral arguments, and pertinent portions of the record. Having done so, we find no reversible error of fact or law by the district court and affirm based on that court's conscientious, well-reasoned opinions, which will be published.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOE CARRABBA, JR., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	NO. 4:96-CV-651-A
	§	
RANDALLS FOOD MARKETS, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

On October 26, 1998, the court conducted a non-jury trial on the issue of whether the employee pension benefit plan known as the Management Security Plan for Cullum Companies ("MSP"), of which the named plaintiffs and the class of persons they represent in this action ("Class") were participants, was "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). After having considered the contents of the Pre-Trial Order for Trial of Class Issue filed October 23, 1998, the evidence received at the non-jury trial (including contents of deposition summaries that were tendered by the parties), and the oral and written submissions by the parties,

the court has concluded that it cannot find from a preponderance of the evidence that the MSP was maintained by an employer primarily for such a purpose.

I.
Nature of Litigation and Events That Led to the Trial of the Issue Defined Above

Generally stated, this is an action brought by the named plaintiffs[1] claiming that Randalls Food Markets, Inc., as the successor employer sponsoring the MSP[2], failed to provide benefits due and owing to them and other persons similarly situated under the MSP when it terminated the plan. Plaintiffs contend that retirement benefits accrued under the MSP were wrongfully forfeited and withheld, and are being denied to them and others similarly situated in violation of the applicable provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001-1461. They contend that the MSP was subject to the vesting, funding, trusteeship, and reporting provisions of ERISA; and, they seek to recover

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[1] The named plaintiffs are Carroll E. Brown, Robert H. Burrows, Jr., Joe Carrabba, Jr., Michael Chessmore, Dave Cooper, Willard P. Correll, Sr., A. Joe Cutrer, Roberto G. Fernandez-Vinas, Rafael Ferrer, Jr., Ed Fortner, Floyd E. Fulcher, Bettie J. Garrett, J. Bruce Gray, Everett G. Grosgebauer, Michael J.Hammer, Wylie B. Holmes, Ima Dell Irvin, William H. Mansfield,Jr., Arvil R. Martin, Jr., Sanford W. Maynard, Thomas 0. McCarthy, Craig McKnight, Joe W. Melton, Denise P. Miller, Jack D. Neal, Scott E. Peterson, Bruce Philpot, Gregory E. Smith, Jack W. Sprabary, James S. Standifer, Robert L. Stockton, Cherie J. Stowe, Loyd Wellesley, Barbara A. Williams, and Ricky Williams.

[2] The record does not make clear the relationship between Randalls Food Markets, Inc., and the MSP at the time the MSP was terminated. However, the effect of stipulations made by the parties is that Randalls Food Markets, Inc., will be deemed to have been the sponsoring employer of the MSP at the time of its termination and the entity that will be held liable if there was a mishandling of plan assets and obligations at the time of and after the termination of the plan.

individually and on behalf of those similarly situated the present value of what they maintain should have been their accrued, vested benefits as of the MSP's termination date, as well as prejudgment and post-judgment interest and attorneys' fees incurred by them in this action.

Defendant contends that plaintiffs and the other persons similarly situated received all, or more than, the benefits to which they were entitled under the MSP. According to defendant, the MSP is what commonly is called a "top hat" plan, which is statutorily defined as a plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). If the plan were to qualify as a top hat plan, it would be exempt from important ERISA requirements, including vesting, funding, trusteeship, reporting, and disclosure. Id.

On June 16, 1998, the court signed an order determining that this action should proceed as a class action for the determination of the issue of whether the MSP qualified as a top hat plan, with the remaining issues to be resolved by future proceedings, as appropriate. The court defined the Class as:

> All persons who on the date of the termination of the Management Security Plan for Cullum Companies, Inc., ("MSP") were participants in the MSP and were employed by Randall's Food Markets, Inc., and everyone who is a beneficiary of such a person who is deceased.

1/16/98 Order Certifying Class at 2. The only issue to be dealt with initially on a class basis was defined as follows:

> Was the Management Security Plan for Cullum Companies, Inc., "a plan which [was] unfunded and [was] maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1)?

Id. The court resolved summarily against plaintiffs and the Class the sub-issue of whether the MSP was unfunded within the meaning of 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). See 6/5/98 Mem. Op. & Order and 9/9/98 Order at 2. That left to be tried at the October 26, 1998, trial the sub-issue of whether the MSP was "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in ERISA. The parties agreed that defendant had the burden of persuasion on that sub-issue.

II.
Nature and History of the MSP

The MSP was established in 1974 by Cullum Companies, Inc., to provide death and retirement benefits to some of the employees of Cullum Companies, Inc., and its subsidiaries. The parties agree that the MSP was an employee pension benefit plan within the meaning of 29 U.S.C. § 1002(2)(A) by virtue of the fact that it is a plan, fund, or program which was established or maintained by an

employer to provide retirement income to employees, or to provide for a deferral of income by employees for periods extending to the termination of covered employment or beyond.

The text of the plan as it initially existed is not in the record, though the record does contain a copy of an agreement between one of the plaintiffs and Cullum Companies, Inc., by which he became a participant in the plan (known at that time as the "Management Security Program").[3] There were two revisions of the plan, first in 1979 and then in 1984. The 1979 revision recited that the purpose of the plan was to "provide specific benefits to a limited group of management employees who contribute materially to the continued growth, development, and future business success of Cullum Companies, Inc. and its subsidiaries." Agreed Ex. 2 at 1. The 1984 version said the purpose of the plan was "to provide specified benefits to a select group of management and highly compensated employees who contribute materially to the continued growth, development and future business success of Cullum Companies, Inc. and its subsidiaries," and stated as the intention of Cullum Companies, Inc. "that this program and

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[3] The parties stipulated that a "true and correct copy of the 1974 basic plan document is identified as Carrabba Exhibit 88.11 10/23/98 Pre-Trial Order for Trial of Class Issue at 14. The document received into evidence as Agreed Exhibit 1 appears to be the same as Carrabba Exhibit 88. However, even though it bears the title "Cullum Companies, Inc. Management Security Agreement," the document shows on its face that it is only an agreement between Cullum Companies, Inc., and Joseph Carrabba, Jr. The first paragraph of the document says that it is an agreement being entered into "for the purpose of enrolling Employee in the Management Security Program (hereinafter referred to sometimes as MSPI)." Agreed Ex. 1 at 1. Perhaps there was no master agreement before 1979, and the MSP consisted of a series of individual agreements between Cullum Companies, Inc., and individual employees prior to 1979.

the individual plans established hereunder be administered as unfunded welfare benefit plans established and maintained for a select group of management or highly compensated employees." Agreed Ex. 3 at I-1. Each plaintiff and Class member was required, as a condition to becoming and remaining a participant in the plan, to defer a portion of his or her annual compensation.

Periodically Cullum Companies, Inc., distributed to employees eligible to participate in the MSP information pertaining to the plan. one of those items was a set of questions and answers, which said under the heading "Exactly What Is The Plan?" that:

> The Cullum Companies, Inc. Management Security Plan (CULLUM MSP) is a company approved and sponsored employee benefit program offered to a select group of key employees. If you elect to become a participant, CULLUM will pay you or your family certain portions of your salary in the event of your retirement or death.

Agreed Ex. 6. In a memo sent by Cullum Companies, Inc., to the plan participants in March 1990, the company gave the following description of the nature and purpose of the plan:

> The Management Security Plan is a Company sponsored benefit program offered once a year to Store Directors, Pharmacists, eligible staff members and current participants. This plan is designed. as a way to accumulate wealth on a before tax basis, cut your current tax liability and provide substantial retirement and survivor benefits.

Agreed Ex. 31.

The plan was managed and administered by an administrative committee, the members of which also served as the executive committee of Cullum Companies, Inc. The administrative committee, following recommendations made to it by the personnel office of the corporation, determined the identities of the employees of the company who would be invited to participate in the plan. That was done once a year. Generally, the employees who were identified by the personnel department as ones eligible to participate in the plan were approved by the administrative committee for participation.

The MSP was terminated in the year 1992 after Cullum Companies, Inc., was acquired by Randalls Food Markets, Inc., or one of its subsidiary or affiliated corporations.

III.
Intent of the Executive Officers of Cullum Companies, Inc. in Establishing the MSP

As Charles Cullum, one of the founders of Cullum Companies, Inc., testified, the intent of Cullum Companies, Inc., in establishing the MSP was to provide additional benefits in the form of deferred compensation to people who were key employees throughout the company. It was designed to meet the "top hat" provisions of ERISA. Throughout the plan's existence, the executives of the corporation intended the MSP to be a top hat plan, and thought it was. The company officials relied on the expertise of Fred F. Wiedemann and his associates in formulating the MSP and advising them to the end of insuring that it was a top hat plan, exempt from the ERISA requirements. Mr. Wiedemann informed Mr. Cullum by letter in January 1975

that ERISA "clearly exempts the Cullum Companies Management Security Plan from nearly all the provisions of [ERISA]." Defs.' Ex. 1. In an August 14, 1975, letter to Cullum Companies, Inc., Mr. Wiedemann represented to the corporation that the "requirements" of the top hat provisions of ERISA had been met "under your plan." Defs.' Ex. 2 at 2.[4]

Houston E. Holmes, Jr., who became general counsel of Cullum Companies, Inc., in 1972, participated in evaluating and approving the plan in 1974. In addition to becoming a member of the MSP, he served on the administrative committee that administered the plan. He concluded from his review in 1974 of the plan and its operation that it was a top hat plan. From the time the plan was adopted in 1974 until he ceased employment in 1992, his understanding was that the MSP was a top hat plan. There was no intent by Cullum Companies, Inc., to change the status of the plan by the adoption of the 1979 and 1984 revisions in the plan. Mr. Holmes considered that part of his job as general counsel of Cullum Companies, Inc., was to

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[4] The evidence suggests that there is a possibility that there was a miscommunication, or lack of communication, between Mr. Wiedemann and his associates, on the one hand, and Cullum Companies, Inc., on the other, concerning eligibility requirements actually used by Cullum Companies, Inc., in operation of the plan. In his January 7, 1975, letter Mr. Wiedemann said that the "Plan is designed so that it is restricted to a specific salary management level..." Defs.' Ex. 1. In fact, in 1974 and 1975, Cullum Companies, Inc., was offering enrollment in the plan to all salaried employees and all members of management. In Mr. Wiedemann's August 14, 1975, letter, he said that the MSP satisfied the requirement that the plan be maintained by an employer "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." Defs.' Ex. 2 at 1-2. The court cannot determine whether Mr. Wiedemann was writing in the context of the method by which the plan was actually being operated as opposed to a misunderstanding of the mode of operation of the plan.

maintain the MSP as a top hat plan; and, he was satisfied that the people who were admitted into the plan satisfied that general purpose.

IV.
The Nature of the Businesses of the Plan Sponsor

When the plan was adopted, Cullum Companies, Inc., was engaged in the food and drug retailing and distribution, meat packing, and real estate businesses. In 1974, Cullum Companies, Inc., and its subsidiaries operated 113 supermarkets in Nebraska, Iowa, South Dakota, Kansas, Missouri, Texas, and California; twenty-one drug stores and a wholesale food division in Dallas, Texas; and meat packing operations in Abilene and Midland, Texas. By 1978, Cullum Companies, Inc., had expanded, apparently through subsidiaries, into the institutional wholesale foods and real estate businesses. Its business operations remained basically the same until the mid-1980s when it sold its operations in the Midwest and in California, but made major expansions in its food and drug operations in the State of Texas, operating under the names "Tom Thumb-Page," "Tom Thumb," "Page Drugs," "Gooch Packing Company," and "Cullum Development Co."

Through a series of corporate reorganization transactions, Cullum Companies, Inc., became an affiliate or a subsidiary of Randalls Food Markets, Inc., in the summer of 1992. As a part of those transactions, the name of the company was changed to "Tom Thumb Food & Drugs, Inc." As of that time, the corporation and its subsidiaries operated thirty-six Tom Thumb-Page Food & Drug Centers (which are large combination stores that carry a broad range of merchandise offered to retail customers), twenty-two Tom Thumb Supermarkets, sixteen Page Super Drug Stores, three

Simon David full-service gourmet supermarkets, and one discount drug store operating under the name "Drugs Plus." And, the company had two distribution centers, one that had gone into operation in 1974 and the other in 1987, which supplied over seventy percent of the products sold in the company's retail stores. The merchandise was shipped from the distribution centers to the retail outlets by use of a large fleet of company-owned trucks, including more than one hundred unrefrigerated trailers and sixty-four refrigerated trailers.

The parties entered into a stipulation concerning the total number of employees of Cullum Companies, Inc., and its subsidiaries for the years 1974 through 1992. The total number was 5,000 in 1974, increasing to slightly more than 10,000 in 1981, and thereafter fluctuating between 9,000 to 11,000 through the year 1992. Approximately one-half of those employees, at least for the years 1980 through 1992, were part-time employees.

V.

The Employees of Cullum Companies, Inc.
Who Were Eligible to Participate,
And Those Who did Participate, in the MSP

The wording of the 1979 and 1984 versions of the MSP is broad enough to allow for participation in the plan of all otherwise eligible employees of all business activities of Cullum Companies, Inc., and its subsidiaries. However, in actual operation of the plan, participation in the plan was available only to certain employees of Cullum Companies, Inc., and its subsidiaries who worked in Texas in the corporate headquarters departments, the retail stores, the warehouses, and the field operations. The record does not reflect the total number of persons employed in Texas in those business activities at any point in time. The court

assumes that a very significant number of the total employees of Cullum Companies, Inc., and its subsidiaries during the years 1974 through 1984 were Texas employees, but in fact the court can only engage in speculation on that subject. However, the record indicates that after the mid-1980s, when Cullum Companies, Inc., sold its business activities in the Midwest and in California, the great majority, if not all, of the employees of Cullum Companies, Inc., and its subsidiaries were Texas employees who, if otherwise eligible, would be permitted to participate in the MSP.

From the beginning in 1974 through the date of the revision of the MSP in 1984, all salaried employees of the operations of Cullum Companies, Inc., to which the MSP applied were invited to participate in the plan. The nature of the grocery business is such that all employees who were salaried were in management at some level. In 1974 ten to twenty percent of the persons employed in the typical supermarket would be salaried. The salary information in the record before the court is incomplete. The information that has been provided shows that the MSP participants in the first year of its operation, 1974, had salaries ranging anywhere from $11,180.00 to $40,000.00 annually, with only one above $30,000.00, only three above $20,000.00, three at $20,000.00, and the remainder less than $20,000.00. More complete information is provided for the years 1975 through 1983. There appear to have been increases in salary levels each year during those years commensurate with the inflationary pressures existing at that time. By 1983 all but two of the plan participants were earning more than $20,000.00 per year, many had an annual salary in excess of $30,000.00, and several in excess of $40,000.00.

The executive officers of the corporation were slow to become involved as participants in the plan, particularly

those who were in the top salary range.[5] Executives who enrolled in 1974 were Mr. Badley, vice president/treasurer, with a salary of $27,500.00; Mr. Corn, vice president/district manager, with a salary of $18,500.00; Mr. Dawson, vice president/data processing, with a salary of $20,000.00; Mr. Hairston, executive vice president, with a salary of $40,000.00; Mr. Knutson, vice president/Page Drug, with a salary of $30,000.00; and Mr. Rutledge, vice president/director of internal audit, with a salary of $21,000.00. The next executive officer to become a participant was Mr. Evans, president and chief operating officer, who joined in 1976, when his salary was $80,000.00. Next came Mr. Cutrer, executive vice president/Rylanders, whose salary when he joined in 1979 was $37,500.00. The next executive to join was Mr. Holmes, vice president/general counsel, who became a participant in 1982 when his salary was $70,000.00. The next, and final, executive officers to become members were Mr. Charles Cullum, chairman of the board, who became a member in 1984 when his salary was $250,000.00, Mr. Gooch, president/Gooch Packing, in 1984 when his salary was $125,000.00, and Mr. Garretson, vice president/grocery merchandising, in 1984 when his salary was $67,500.00."[6]

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[5] The parties stipulated that in 1974 "the Company" (which the court assumes has reference to Cullum Companies, Inc.) established another retirement plan, the second one known as the "Senior Corporate officers, Plan," which, according to the stipulation, was a plan for high-level executives, had fewer than seven members, all of whom were members of the board of directors or executive committee members, and was non-contributory. 10/23/98 Pre-trial order for Trial of Class Issue at 15. The trial record does not contain further information concerning the purpose of, or benefits provided by, this second plan.

[6] The court is not mentioning employees who became participants in the plan when occupying a lower level of management but later were promoted to executive positions. For example, omitted is Mr. Brooks

All levels of management were represented by the participants in the plan during the years 1974 through 1983, starting with executive officers of the company, going down to division managers (who managed more than one store), to store directors (or store managers), to co-store directors (co-store managers), to assistant store directors (assistant store managers), and to managers of departments within the stores, managers in the warehousing operations, managers in the executive office operations, and supervisors over various other business functions.

Starting in 1984, to become a new participant in the MSP the employee had to have an annual salary of at least $25,000.00. That eligibility criteria existed during the years 1984, 1985, and 1986. During those years the range of levels of management participating in the plan and the range of salaries of participants, taking into account the naturally occurring across the-board increases in salaries, were similar to the ranges existing in prior years. Throughout the years 1974 through 1986, Cullum Companies, Inc., considered everyone who had any level of management to be a key employee of the company. The goal was to make participation in the MSP available to all of those key employees.

The eligibility requirements for participation in the plan were tightened in the year 1987, and again in the years 1988, 1989, 1990, and 1992. In 1987 eligibility was limited to (1) store directors and pharmacists at retail locations, (2) employees at the Inwood Road Center (the executive office of Cullum Companies, Inc.) who were either officers,

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Cullum, who became a member of the plan in 1974 when he was a division manager earning a salary of $23,000.00 per annum, and who, by no later than the 1979 plan year, was a vice president with a salary of $42,000.00.

division managers, merchandisers, department directors, assistants to department directors, or persons with a base salary minimum of $45,000.00, and (3) all then-current MSP participants (as of January 1, 1987) who did not meet the new eligibility requirements (who were to be allowed to continue to participate in the plan without any modification). The only changes in 1988 were to add a new subcategory of "field merchandisers" to the "Inwood Road Center" group, to eliminate from the general "Inwood Road Center" group the subcategory having to do with a base minimum salary of $45,000.00 annually, and to add a new general category "Selected Key Staff with a base salary minimum of $50,000.00 annually." Agreed Ex. 10. In 1989 the base minimum salary was raised to $55,000.00; in 1990 it was raised to $60,000.00; and in 1992 the "pharmacists" designation in the "Retail Location" group was changed to "full-time pharmacists." Agreed Ex. 14. Otherwise, the eligibility criteria stayed the same.

The record does not reflect, on an annual basis or otherwise, the number of employees of Cullum Companies, Inc., who were eligible to participate in the MSP under the criteria for participation as they existed from time to time. However, there is indication in the record that there probably were a significant number of persons eligible to participate who did not actually participate. Apparently the eligible employees had to be sold on the notion of participating in the MSP. The largest new enrollment in the MSP was in the year 1984, after the benefits were improved, while the company was growing rapidly, and had "a new insurance consultant that did a better job presenting the program to eligible people." Tr. 50-51. The number of new enrollments in the plan each year, starting with 1974 going through 1991, were as follows: 1974, 57 new enrollees; 1975, 17 new enrollees; 1976, 15 new enrollees; 1977, 5 new enrollees; 1978, 1 new enrollee; 1979, 55 new enrollees; 1980,

51 new enrollees; 1981, 16 new enrollees; 1982, 34 new enrollees; 1983, 2 new enrollees; 1984, 168 new enrollees; 1985, 67 new enrollees, 1986, 98 new enrollees; 1987, 27 new enrollees; 1988, 18 new enrollees; 1989, 8 new enrollees; 1990, 13 new enrollees; and 1991, 23 new enrollees. Perhaps as an indication of a shift in the emphasis of the corporation's business, all but thirteen of the new enrollees in the years 1987 through 1991 were pharmacists or pharmacy managers.

As new participants joined the plan, some of the existing participants terminated participation for one reason or another. The net cumulative numbers of participants in the plan on a plan year basis are as follows: 1974, 57 participants; 1975, 68 participants; 1976, 72 participants; 1977, 70 participants; 1978, 63 participants; 1979, 113 participants; 1980, 153 participants; 1981, 160 participants; 1982, 188 participants; 1983, 186 participants; 1984, 346 participants; 1985, 395 participants; 1986, 447 participants; 1987, 441 participants; 1988, 431 participants; 1989, 356 participants; 1990, 331 participants; 1991, 328 participants; and 1992, 297 participants (with 247 participants on the date when the plan was terminated).

All of the MSP participants were viewed by the officials of the corporation to be important to the day-to-day operations and activities of the company. As a group, they were all important to the business and policy decisions of the company. Starting with the changes made in 1987, the changes in the criteria for eligibility to participate in the plan were in response to a thought by the officials of the corporation that the plan should be more restrictive, and because of profit pressure.

Nevertheless, throughout the MSP's existence the enrollees in the plan were persons thought by officials of the corporation to be members of corporate management or

highly compensated individuals. (The levels of compensation for employees in the grocery and related businesses are historically lower than in other industries.)

The decision to allow persons to remain in the plan who were not qualified under newly adopted criteria[7] was prompted primarily because the officials of the company considered those persons to still be valuable members of management--they were still valuable to the company, and it would have been a devastating morale blow for them to be denied the opportunity to continue to participate in the plan. Initially, the administrative committee decided that participants in that category could continue to participate but that their level of participation would not increase as their salaries increased. However, there were so many complaints from those participants about their benefits being frozen that the administrative committee changed its mind, and allowed those who were "grandfathered" in the plan to have full participation thereafter.

In a few instances, a plan participant who was demoted to a position that if held when the employee entered the plan would have caused him or her not to be eligible for participation at the time of his or her entry, was allowed to continue to be a plan participant. Consequently, anyone who became a participant in the plan was allowed to continue as a participant, no matter what change there might have been in his or her job status (except, of course, participation terminated when employment terminated).

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[7] The written documentation indicates that the grandfathering of participants who did not qualify under newly adopted criteria applied only to participants who were in the plan as of January 1, 1987, see Agreed Exs. 9-14; but, in practice the grandfathering applied to all participants who did not meet new criteria, including criteria adopted after 1987.

The administrative committee never had a formal definition of "management" to guide them in determining eligibility for participation in the MSP. Similarly, it had no standard to guide it in determining which employees would be considered "highly compensated employees," other than the standards mentioned above-all salaried personnel until 1984, and from 1984 through 1992 the salary minimums mentioned above, beginning at $25,000.00 in 1984 and going to $60,000.00 starting in 1990. Neither the administrative committee nor anyone else in a position of authority with Cullum Companies, Inc., attempted to be more selective in the choice of employees to participate in the MSP than to apply the selection criteria that have been mentioned above in this section of this Memorandum Opinion and order.

Other than the one instance mentioned above of a change in plans relative to benefits for "grandfathered" participants, no evidence was offered to suggest that the participants in the MSP were able to influence the benefits to be provided under the MSP or any of the terms of the MSP, or tried to exercise any such influence. The court cannot find from the evidence that any participant in the MSP, with the possible exception of the few executive officers of the corporation who were participants, had the bargaining power to influence the benefits or other terms of the MSP in any respect.

With, perhaps, de minimis exceptions, all persons eligible to participate in the MSP were a part of the management of Cullum Companies, Inc., or one of its subsidiaries, at one management level or another. And, again with de minimis exceptions, and bearing in mind the salary levels expected in business operations of the kind in which Cullum Companies, Inc., and it subsidiaries were engaged, all participants in the MSP could be viewed to be "highly compensated employees."

VI.
Pertinent Legal Authorities

As previously noted, the statutory standard defendant's proof was required to meet at trial was that the MSP was "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 28 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). The Fifth Circuit explained, in a different context, that statutory words must be given meaning. See Spacek v. Maritime Ass'n., 134 F.3d 283, 289 (5th Cir. 1998). The definition of a top hat plan has been described as a narrow one. See In re New Valley Corp., 89 F.3d 143, 148 (3d Cir. 1996), cert. denied, 117 S. Ct. 947 (1997). In applying the statutory language, the court must take into account that "ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants," and that exemptions from the ERISA coverage should be confined to their narrow purpose. Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983).

"[T]op hat plan participants, unlike ordinary pension plan participants, are typically high-ranking management personnel" who "are therefore better equipped than ordinary pension plan participants to effectively protect their interests in the employee benefits bargaining process. Spacek, 134 F.3d at 296 n.12. "This is the very reason that Congress chose not to subject top hat plans to ERISA's vesting, accrual, participation, and fiduciary requirements." Id. The Department of Labor's view of the reason for, and justification of, the top hat exemption was expressed as follows:

> [In providing relief for "top hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain

> individuals, by virtue of their positions or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore, would not need the substantive rights and protection of Title I [of ERISA].

Id. (quoting Dep't of Labor Op. Ltr. 90-14A).

The enactment by Congress of ERISA was a recognition that the employees to be aided by ERISA lacked the bargaining power to obtain nonforfeitable benefits through contractual negotiations. See Gallione v. Flaherty, 70 F.3d 724, 727 (2d Cir. 1995). In the course of explaining how a top hat plan fits into the ERISA scheme, the Second Circuit said:

> As one method of accomplishing the goal of decreasing the number of lost pensions, ERISA established certain minimum requirements that covered plans must meet, including requirements for nonforfeitability, i.e., vesting. However, Congress made ERISA's vesting provisions inapplicable to any plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). *See also id.* § 1081(a)(3) (excepting such plans from ERISA's funding requirements); id. § 1101(a)(1) (excepting such plans from ERISA's fiduciary

> responsibility requirements). Dubbed a "top hat" plan, such a plan was excluded from ERISA's vesting, funding, and fiduciary responsibility requirements because Congress deemed top-level management, unlike most employees, to be capable of protecting their own pension expectations.

Id.

A legitimate top hat plan must cover a "select group" of employees who are "only high-level employees." In re New Valley Corp., 89 F.3d at 148. The mere fact that the employer intends the plan to be a reward to "key" employees does not satisfy the degree of selectivity contemplated by the statutes. See Hollingshead v. Burford Equip. Co., 747 F. Supp. 1421, 1429 (M.D. Ala. 1990). Rather, the statute contemplates that a top hat plan will be for the benefit of "high-ranking employees." See Bigda v. Fischbach Corp., 898 F. Supp. 1004, 1015 (S.D.N.Y. 1995), aff'd, 101 F.3d 108 (2d Cir. 1996).

VII.
Application of the Law to the Facts of this Case

The decision the court has concluded it must reach in this case, that defendant has not met its burden to establish that the MSP was a top hat plan, is made difficult by the acceptance by the court of the evidence that Cullum Companies, Inc., at all times intended the MSP to be a top hat plan and operated on a good-faith belief that it so qualified. The court is satisfied that at no time did the corporation or any of its officials act with an improper motive or with any design to cheat or otherwise financially

abuse its employees or to cause them to receive less than the benefits to which they were entitled under the law. And, the court is satisfied that at all times Cullum Companies, Inc., and its officials, including the members of the administrative committee, conducted themselves in relation to the MSP with the goal in mind to be fair to the participants in the administration of the plan.

Unfortunately, however, notwithstanding the good intent of Cullum Companies, Inc., and its officials, the court simply cannot find from the evidence that the MSP was maintained by Cullum Companies, Inc., and its subsidiaries "primarily...for a select group of management or highly compensated employees."[8] The words "a select group of" must be given some meaning. Quite candidly, the court questions whether it can articulate the meaning of the words "a select group," as used in the statute. The furthest the court can go is to express the conclusion that it cannot find from the evidence that the participants of the MSP were "a select group" out of the broader group of management employees or the broader group of highly compensated employees.

Perhaps, as the Department of Labor and some of the court decisions have suggested, the "select group" test is whether the members of the group have positions with the employer of such influence that they can protect their retirement and deferred compensation expectations by direct negotiations with the employer. The evidence does not persuade the co-art that any significant number of the participants in the MSP individually had bargaining power of that kind. Of course, as a group, to the extent that they could act cohesively, they undoubtedly could influence the

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[8] The court does not reach the issue of whether the MSP was maintained "primarily for the purpose of providing deferred compensation."

design and operation of the MSP, but that would be true of any group of employees within a company.

As sympathetic as the court is with the attempts by Cullum Companies, Inc., to be fair with its employees in the design and application of the MSP, the court cannot find from the evidence that defendant has proved by a preponderance of the evidence that the MSP was maintained for a select group of management or highly compensated employees, as those words are used in ERISA.

Therefore,

VIII.
ORDER

The court ORDERS and DECLARES that the MSP was not "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," as those words are used in 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1).

SIGNED February 18, 1999.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOE CARRABBA, JR., ET AL.,	§	
Plaintiffs,	§	
VS.	§	NO. 4:96-CV-651-A
RANDALLS FOOD MARKETS, INC.,	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

The background of this litigation and its history through mid-February 1999 are set forth in the memorandum opinion the court signed February 18, 1999, Carrabba v. Randalls Food Markets, Inc., 38 F. Supp.2d 468 (N.D. Tex. 1999), the contents of which are adopted by reference. Since mid-February 1999, the court has held proceedings to the end of resolving the remaining issues. A bench trial on those issues was conducted November 22, 1999.

A.
The Remaining Issues to be Decided

A conclusion that follows from the court's decision that the MSP did not qualify as a "top hat" plan is that the

members of the Class did not receive the financial benefits they should and would have received upon termination of the plan in 1992 if the plan sponsor had recognized that the MSP was subject to the accrual and vesting requirements of ERISA and had acted accordingly. By order signed July 13, 1999, the court certified for handling on a Class basis all issues that remained to be resolved in this action. The Class continued to be as previously defined. See Carrabba, 38 F. Supp.2d at 470. The court's task now is to fashion appropriate equitable relief, see 29 U.S.C. § 1132(a)(3)(B), for the Class to provide them financial benefits that will recognize the requirements of ERISA.

The parties are in serious disagreement over the nature and level of the benefits the court should afford the Class by way of equitable relief. Plaintiffs argue that the court should match the financial generosity they say the plan sponsor showed the plan participants over the years by providing equitable relief on the basis of a formula and calculation techniques that would produce a financial result they contend recognizes that generosity. And, plaintiffs maintain that, because of having kept and used in its business money that they say should have been paid to the participants, defendant should be required to share with the Class its business profits. In contrast, defendant maintains that the equitable relief should not extend beyond the difference between the financial benefits the Class would have received upon termination of the plan if the employer had complied with the minimum obligations ERISA imposed on the employer with respect to the plan and the payments the Class members actually received when the plan was terminated. Apparently, defendant concedes that it should pay prejudgment interest on that difference.

If the court were to adopt the approach urged by the Class, their award against defendant would be in excess of $100,000,000. In contrast, defendant is urging the use of a formula and calculation techniques that would produce for the Class an award of around $5,000,000 plus prejudgment interest. Each side's version of equity is sponsored by a seemingly well-qualified expert witness, Craig Dale Rogers ("Rogers") for the plaintiffs and Joe Huffman ("Huffman") for the defendant, each of whom maintains with apparent sincerity that a proper application of ERISA to the facts of this case supports the version of equity advanced by the side that employed him.

The starting point in the calculations of each side is the projected retirement benefits, as specified in agreements made between the plan sponsor and the participants, to be received by the respective participants upon retirement from the plan sponsor's employment at age 65. But the calculations of the parties have little in common beyond that starting point. Each expert witness presented alternative sets of calculations, with a preferred set as to each. Rogers's preferred set is under tab G of Agreed Exhibit 138. Huffman's is under tab A of Agreed Exhibit 139.

The preferred calculations of Rogers show an underpayment to the participants upon plan termination of $42,550,941. According to Huffman's preferred calculations, the underpayment was $4,802,863. This large discrepancy is attributable primarily to the following differences in calculation techniques, factors, and assumptions used by the experts:

1. Rogers used in his calculations a straight-line, current compensation accrual method, and the benefits were accrued over years of service with the plan sponsor rather

than years of participation in the plan.[1] In contrast, Huffman used a career average accrual method, with the accrual calculated on the basis of years of participation in the MSP rather than years of employment with the plan sponsor.[2]

2. Rogers assumed in his calculations that all participants, regardless of years of participation in the plan, became 100% vested in their accrued benefits when the plan was terminated. Huffman used a five-year cliff vesting (as contemplated by 29 U.S.C. § 1053(a)(2)(A)) assumption in his calculations.[3]

3. Rogers assumed in most of his sets of calculations full accrual by age fifty-five.[4] Huffman used in his calculations a retirement age of sixty-five.

4. Rogers used the applicable Pension Guarantee Benefit Corporation ("PBGC") rate in his present value calculations, whereas Huffman used 120% of the PBGC rate in all instances where the present value exceeded $25,000.

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[1] Rogers performed alternative calculations that assumed as to each participant that the full benefits the participant was to receive under the MSP upon retirement were accrued on the date the plan terminated, without regard to the participant's tenure of employment or years of participation in the plan.

[2] Huffman performed alternative calculations using the straight-line accrual method.

[3] Huffman performed alternative calculations based on the assumption that all participants were 100% vested on the date of termination of the plan.

[4] In some of Rogers, calculations he assumed full accrual by age fifty-five, but that payment of retirement benefits would not start until age sixty-five. In his preferred calculations, Rogers assumed full accrual by age fifty-five, and that the retirement payments would commence at that age.

5. Rogers did not use a mortality factor (which would take into account the possibility that a participant would die prior to retirement date) in his calculations of present value. Huffman did.

6. Rogers used a plan termination date of August 24, 1994,[5] (which is the earliest date when defendant could have terminated the plan if it had honored a contractual commitment it made to the initial plan sponsor) in his preferred calculations rather than to use the actual date of termination of December 31, 1992. Huffman used in his preferred calculations the actual date of termination.[6]

In addition to the calculation disputes, the following issues must be resolved:

1. (a) the rate to be used in the calculation of prejudgment interest (interest calculated from the actual or assumed date of termination of the MSP through the date of entry of judgment) on the underpayment amount the court determines the members of the Class should receive from defendant, and (b) whether the interest should be compounded;[7]

2. the effect, if any, on the claims at issue of release documents certain members of the Class executed

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[5] Rogers presented an alternative preferred calculation, under tab H of Agreed Exhibit 138, in which a December 31, 1992, termination date was used. That calculation produced a $34,767,517 underpayment number.

[6] Huffman performed an alternative set of preferred calculations using an August 24, 1994, termination date, which produced an underpayment number of $6,637,556.

[7] Defendant seems to concede that there should be an award of prejudgment interest, but disputes the rate urged on behalf of the Class and the contention of the Class that there should be compounding.

and delivered to defendant upon termination of employment;

3. whether the members of the Class should be awarded a share of the profits defendant made from its use of funds that would have been paid to the Class if defendant had properly determined vested accrued benefits and paid them at the time the plan was terminated;

4. whether the employees who would have been properly included as participants in a "top hat" plan should, for that reason, be denied recovery of additional termination benefits;[8] and

5. the amounts, if any, to be awarded the Class against defendant as attorneys, fees and other litigation expenses.[9]

B.

The Plan Document and Related Plan Agreements

Because the MSP was intended to be a top hat plan exempt from ERISA requirements, it was not drawn as a plan in compliance with ERISA. The MSP lacked the vesting and accrual provisions mandated by ERISA. See 29 U.S.C. §§ 1053(a) and 1054(a) and (b). There was no provision for accrual or vesting prior to a participant's actual retirement of

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[8] Plaintiffs contend that all participants should share in the recovery. Defendant maintains that equity compels exclusion of the participants who could have been in a top hat plan.

[9] The court and the parties have proceeded on the basis that the procedural requirements of Federal Rule of Civil Procedure 54(d)(2) have been satisfied as to the claim by plaintiffs for recovery of attorneys, fees from defendant under 29 U.S.C. § 1132(g)(1).

any of the financial contributions the MSP contemplated the employer would make to the projected retirement benefits.

The normal retirement benefits provided by the MSP, and some of the conditions to receipt of those benefits, were specified by the plan document as follows:

> 4.1 Normal Retirement. If a Participant has remained an Employee until age sixty-five (65) and shall then Retire, and if this Program and his Plan Agreement have been kept in force, the Company will pay or cause to be paid to such Participant as a Retirement Benefit (herein so called), the amount per month specified in his Plan Agreement, commencing on the first day of the month following such Participant's retirement, or as otherwise specified in his Plan Agreement.

Agreed Ex. 3 at IV-1. The words "Retirement" and "Retire," as used in the plan, were defined by the plan to mean "severance of employment with the Company at or after the attainment of age sixty-five (65)." Id. at I-2.

By separate plan agreements, which were annexes (Annex I's) to the MSP, the projected retirement benefits commencing at age 65 for the respective plan participants were specified. An example of the standard language defining the amount of the retirement benefits (except for differences in the dollar amount) used in these agreements is as follows:

3. Retirement Benefit:

(a) Retirement at age 65 - $148,200

This amount to be paid in 120 equal monthly installments (or as otherwise mutually agreed by the Participant and the Committee) following age 65 or following retirement, as determined by the Committee.

Agreed Ex. 3, Annex I at first and second pages. Each plan agreement went on to specify the dollar amount to be deducted from the participant's compensation each month as the contributions of the participant, by way of compensation deferrals, to the cost of the retirement benefit. Id. at second page. Thus, payment of the compensation deferrals by a participant was a further condition to receipt of the retirement benefits of the MSP.

The plan document expressly gave the employer "the right to terminate...[the plan] at any time," Agreed Ex. 3 at X-1, except as to any participant who was in pay status under the plan by reason of retirement, Id.[10] According to the plan document, termination of the plan caused the employer to have no further obligation under the MSP. Id. A participant's right to receive a retirement benefit under

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[10] The annexes also addressed plan termination, saying:

> [T]he Plan and this Plan Agreement may be terminated at any time, in the sole discretion of the Company, without any obligation of any nature whatsoever to the Company, except a Participant shall have those rights provided for the extent such may be applicable to him at the time of such termination.

Agreed Ex. 3, Annex I at third page.

the plan was said by the plan document to "be forfeitable at all times prior to the date that he first satisfies the requirements for Retirement hereunder." Id. at IV.

2. Specifically, the plan said that "no portion of a Participant's Retirement Benefit shall accrue to him prior to the date that he first satisfies the requirements for Retirement hereunder." Id.

An early retirement benefit, "in an actuarially reduced amount," was described in the plan document, but the determination of the amount as to a particular participant was left to the "sole and absolute discretion" of the retirement plan committee. Agreed Ex. 3 at IV-1. A later document provided by the employer to the plan participants established a formula for determination of early retirement benefits. Pls., Ex. 6 at 2. The benefits were to be a percentage of the normal retirement benefit, determined by age at retirement and years of service. Id.

As the court has previously ruled, the MSP was an unfunded retirement plan. 6/5/98 Mem. Op. & Order; 9/9/98 order. Retirement benefits were to be paid from the general assets of the employer. Agreed Ex. 3 at VII-1.

The annexes provide with respect to the employer's financial obligations upon termination of the MSP that:

> Upon any termination of the Plan, the Company, after payment of all involuntary termination benefits, may in its absolute discretion pay any additional benefits the Committee may determine.

Agreed Ex. 3, Annex I at third page. The paragraph of the annex that immediately precedes the language that is quoted

above makes clear that the term "involuntary termination benefits" has reference to "an amount equivalent to all of [the participant's] deferrals to the Plan." Id. Thus, prior to a participant's retirement pursuant to the terms of the plan, the only accrued or vested interest a participant had under the plan was in his or her deferred compensation contributions.

C.

Representations Made by the Plan Sponsor-Employer

Plaintiffs maintain that written and verbal representations made by the employer to the plan participants from time to time were the equivalent of amendments to the plan document and plan agreements. However, the court cannot find that any representation was made by the employer to the participants that would justify a reasonable belief by the participants that, in any respect relevant to the issues presented here, their rights under the MSP were greater than, or different from, the rights and obligations described in the plan document and the plan agreements, as set forth above.

D.

The Payments That Were Made Upon Termination of the MSP

If the terms of the MSP and related documents had been followed, the only payment defendant would have been obligated to make to any non-retired participant upon termination of the plan would be the total amount of his or her deferred contribution payments. However, the official of defendant, Bobby Louis Gowens, ("Gowens") who calculated the amounts to be paid to the participants when

the plan was terminated disregarded the employer's payment obligations under the plan and related documents, and arbitrarily arrived at a formula for determining the amounts to be paid. His formula gave all participants some credit for the number of years of service he or she had, and took into account the total amount of the contributions of the participants by way of compensation deferrals.

Gowens said that his calculations were not based on what the MSP plan documents said, but simply were what he thought the "people ought to receive."[11] Narrative Summary of Deposition Testimony of Bobby Gowens at 3. Many, if not most, of the payments he caused to be made were more than the MSP required. The underpayments calculated by the expert witnesses are the amounts they, respectively, concluded the participants should have received over and above the payments made pursuant to the calculations of Gowens for, in the respective views of the expert witnesses, the requirements of ERISA to be properly recognized.

E.

The Relief to be Granted by the Court is Equitable Relief–Not a Recovery Under the Plan

Plaintiffs maintain that they are entitled to recover under the authority of 29 U.S.C. § 1132(a)(1)(B) benefits due them under the terms of the MSP. If recovery under the terms of the MSP were the nature of plaintiffs, action, they would recover very little because there is no evidence that

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[11] The discretionary calculations were, in fact, consistent with the authority the plan sponsor had to pay to participants upon termination of the plan "any additional benefits" it, in its "absolute discretion," might choose to pay. Agreed Ex. 3, Annex I at third page.

upon termination of the MSP they did not receive basically everything to which they were entitled under the provisions of the MSP. The remedy of the Class lies instead in the grant of appropriate equitable relief, as contemplated by 29 U.S.C. § 1132(a)(3)(B), to address violations of, and to give effect to, the accrual and vesting provisions of ERISA. In deciding the equitable relief to be granted, the court is taking into account all the facts and circumstances described in Carrabba v. Randalls Food Markets, Inc., 38 F. Supp.2d 468 (N.D. Tex. 1999), as well as all the evidence received during the course of both trial proceedings conducted in this case.

The court has concluded that equity would be served in this case if the members of the Class were to be placed in basically the same financial position in which they would be if the employer had complied with the minimum requirements necessary for the MSP to satisfy the accrual and vesting provisions of ERISA[12] and if the underpayments made to the Class were to be determined on an assumed August 24, 1994, date for termination of the MSP (bearing in mind the contractual commitment of defendant not to terminate the plan prior to that date).

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[12] The court recognizes that in certain instances over the years the employer provided benefits to the plan participants that exceeded the employer's obligations under the MSP, and, that the retirement benefits, when earned under the MSP, were often generous. However, the court cannot find that there was a pattern of conduct that would justify a conclusion that equity would be served by awards in excess of those the court is granting. With exceptions that are not material to the conclusions expressed in this opinion, the MSP was administered in accordance with its provisions over the years of its operation. As a rule, before the plan was terminated, the persons whose participation in the MSP ended prior to their retirement received only the return of their deferrals.

F.

Defendant Has Not Established
That Any Member of the Class Released
His or Her Claim

In return for a severance payment based on years of service and accrued vacation time, some participants, when terminating employment with defendant after the MSP was terminated, signed a document releasing and discharging defendant "from all claims, liabilities, demands and causes of action, known or unknown, fixed or contingent, which [they might] have or claim to have against [defendant] as a result of [their] employment and this termination." E.g., Agreed Ex. 110 at first page. An affirmative defense asserted by defendant against those participants is that the documents they signed released defendant from liability as to the claims being asserted in this action.

The validity of a waiver of pension benefits under ERISA is subject to closer scrutiny than a waiver of general contract claims. Sharkey v. Ultramar Energy, Ltd., 70 F.3d 226, 231 (2d Cir. 1995). Courts scrutinize an ostensible waiver with care in order to ensure that it reflects the purposeful relinquishment of an employee's rights. Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181 (lst Cir. 1995). In other words, a "knowing and voluntary" test is applied. Sharkey, 70 F.3d at 231. The burden is on the defendant to show that a plaintiff intentionally relinquished or abandoned a known right or privilege. Smart, 70 F.3d at 181-82.

In this case, the court cannot find that defendant has met its burden as to any of the plaintiffs. In particular, there is no evidence that any of the plaintiffs understood that they were releasing claims relating to the MSP, which had been

terminated on December 31, 1992, long before the executio of any of the releases. The facts of this case are thu distinguishable from those in the cases cited by defendar See, e.g., Morais v. Central Beverage Corp. Unio Employees' Supplemental Retirement Plan, 167 F.3d 709 (1 Cir. 1999) (settlement of suit on improper calculation disability pension barred second such suit); Wittorf v. She Oil Co., 37 F.3d 1151 (5th Cir. 1994) (plaintiff wh specifically threatened to revoke release of ERISA claims bu failed to timely take action could not later sue on thos claims); Mange v. Petrolife Corp., 960 F. Supp. 206 (E.D. M 1997), aff'd, 135 F.3d 570 (8th Cir. 1998) (signers who knev company position about vacation pay could not clai release did not affect vacation pay rights).

The indication from the evidence is that neither part to the waiver/release documents gave any thought to th MSP or any claims arising under the MSP when th documents were drawn, signed, and delivered. There certainly no basis in the evidence for any finding that an signatory on such a release/waiver document intended b execution and delivery of the document to release defendar of any claim that is being asserted in this action.

G.

Eligibility to Participate in a "Top Hat" Plan
Is Not An Equitable Reason for Denial of Recovery

The court is not persuaded that equity compe exclusion from recovery in this action of those participan in the MSP who could have properly been included participants in a top hat plan. Consistent with the princip underlying ERISA that, as a general proposition, employer should provide uniform treatment to participan in a retirement plan, Frontier Airlines, Inc. v. Fronti

Airlines, Inc., Pilot's Pension Board (In re Frontier Airlines, Inc.), 84 B.R. 724, 729 (Bankr. D. Colo. 1988), the court has concluded that all participants in the MSP should be given uniform treatment in the calculations of the awards to be made to the participants against defendant and the granting of those awards.

H.

"Profits" Made by Defendant Are Not to Be Included in the Awards

The court has concluded that equity does not compel an award to the members of the Class against defendant of any amount that would represent profits made by defendant from its use of funds that it would have paid to the Class if it had honored ERISA's accrual and vesting requirements at the time the plan was terminated. The factors the court considered in determining the relief to be granted plaintiffs against defendant are sufficient to satisfy the demands of equity. There is no need, from an equitable standpoint, to include in each of the awards a speculative number based on the notion that defendant's business ventures would not have been as profitable after the date the plan was terminated if defendant had recognized that the MSP was not a top hat plan and had made termination distributions to the participants on a basis that took into account the requirements of ERISA.

I.

Equitable Resolutions of the Calculation Disputes of the Experts

The approach of plaintiffs and their expert to the calculations of the awards to be made to the plaintiffs misinterprets, for the most part, the goals of ERISA. After

having related the facts that led to the passage of ERIS Congress concluded the first paragraph of its findings a declarations of policy with the following words:

> [I]t is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a) (emphasis added). And, in the fir paragraph of its findings and declaration of policy, Congre explained that the policy of ERISA was "to protect...t interest of participants in private pension plans...b improving the equitable character and the soundness of su plans by requiring them to vest the accrued benefits employees with significant periods of service..." Id. 1001(c) (emphasis added). The court concludes tha generally speaking, giving the participants the benefit of t "minimum standards" of ERISA would satisfy the poli behind ERISA by "assuring the equitable character" of t MSP. Id. § 1001(a).

Once the equitable character of the MSP has be assured by calculations that define the payments that wou be required to satisfy the minimum standards of ERIS there will have been a great stride toward the objective fashioning the appropriate equitable relief the court empowered to grant by 29 U.S.C. § 1132(a)(3)(B). Thus, wi exceptions to be noted, the court has concluded that t minimum standards of ERISA should be recognized, a given effect, in the calculations. The court's task in th

regard is simplified to a degree by the concession of Rogers that if his "mission statement was...to calculate only benefits that would not be forfeitable under ERISA," he would have done the same thing Huffman did in his calculations. 11/22/99 Tr. at 111. Rogers, in effect, admitted that the products of Huffman's calculations are the amounts that defendant would have been obligated to pay to the participants upon termination of the plan if the MSP had satisfied the minimum standards of ERISA. Id. at 109-11.

1. The Accrual Methods that Should be Used In the Calculations.

As a defined benefit plan, the MSP should have satisfied one of the three accrual schedules set forth in 29 U.S.C. § 1054(b)(1). Plaintiffs, expert witness, Rogers, proposes for use in the damage calculations a straight-line, current compensation accrual method of the kind contemplated by 29 U.S.C. § 1054(b)(1)(C), while defendant's expert witness, Huffman, advocates use of a career average accrual method that satisfies the requirements of 29 U.S.C. § 1054(b)(1)(B). Each expert said his selection was based on his assessment of the method that most closely resembles the progression of MSP benefits he observed in the actual operation of the MSP over the years.

Due to the absence of an accrual method in the plan, the court is called upon to select for use in the calculations of the awards to be made to the participants against defendant one that, in equity, most appropriately recognizes the objectives of the MSP in an ERISA context. The court finds that the accrual method advocated by Huffman is the one that should be used for that purpose. That Huffman's method of accrual is not expressed in the MSP and was never used during the operation of the MSP is neither

surprising nor relevant. Because the employer thought the MSP was not subject to ERISA accrual requirements, the plan contained no accrual method, and there was never an occasion under the terms of the plan to calculate an accrual (except to the extent that deferred compensation payment calculations for a terminating employee might be viewed to be such).

2. Years of Participation in the Plan Rather Than Years of Service Should be Used in the Calculations.

The court fails to perceive the logic in the use by Rogers of years of service with the employer rather than years of participation in the plan in his calculations. On the other hand, Huffman's use of years of participation in the plan in his calculations makes sense in the light of the language of the MSP.

The MSP provided that as a condition to participation in the plan, and receipt of benefits under the plan, an employee had to make contributions by way of compensation deferrals. Such contributions were made only during the employee's participation in the plan, not during the years of employment prior to plan participation. Under the terms of the plan, a "Participant" was "an Employee who is selected and elects to participate in the Program through the execution of a Plan Agreement..." Agreed Ex. 3 at I-2.

There is nothing in the MSP plan document or the related agreements to suggest that years of employment was a factor in determining benefits to be received under the MSP, while, as noted, there is indication that years of participation in the plan was a factor. The court has

concluded that Huffman correctly used years of participation in the plan in his calculations.

3. The Normal Retirement Age of Sixty-Five Should be Used in the Calculations.

No plausible rationale was provided by Rogers for his use of the early retirement age of fifty-five for all participants in his calculations. The court has concluded that early retirement benefits are not required to be taken into account in determining accrued benefits under ERISA, and that Huffman correctly used the normal retirement age of sixty-five in his calculations.

4. The Methods Used BV Huffman to Determine Present Value Are Proper.

The court is satisfied that if the plan sponsor had realized that the MSP did not qualify as a top hat plan, and, therefore, had complied with the vesting and accrual standards of ERISA, the retirement plan would have included provisions authorizing use of the discount techniques employed by Huffman to determine present values. The MSP reflects an intent to minimize the obligations of the employer upon termination of the plan. Therefore, the court considers it appropriate, when converting the plan sponsor's obligations to ERISA-based termination obligations, to apply the minimum standards for determining present value that could have been adopted by the employer. Equity will have been served in this case by the use of 120% of the PBGC rate in the present value calculations in all, instances where the present value exceeds $25,000, and by the use of a mortality factor in the making of those calculations.

5. The 100% Vesting Assumption Should be Used.

The court finds that the five-year cliff vesting formula used by Huffman is acceptable under ERISA, and that it was a formula commonly used by employers. However, the court finds that the most equitable approach to vesting would be to consider that all participants became 100% vested at the time of plan termination. Such a 100% vesting would have been required if the MSP had been a tax-qualified plan. For this purpose, the court assumes that the employer would have caused the plan to be tax qualified if the employer had been aware that the plan was subject to the accrual and vesting standards of ERISA.

6. A Plan Termination Date of August 24, 1994, Should Be Used.

The parties are in agreement that if defendant had honored an agreement it made with the initial plan sponsor at the time defendant purchased the sponsor, the defendant would not have terminated the plan before August 24, 1994. Without reaching the issue of whether the participants in the plan were beneficiaries of some nature of defendant's contractual commitment, the court has concluded that it would be inequitable for the plan participants to be totally denied relief from the consequences adverse to them of such a premature termination of the plan.[13]

Therefore, the court, in fashioning appropriate equitable relief for the Class, is going to be guided by the

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[13] In reaching the conclusion that August 24, 1994, should be used as the termination date, the court has taken note that Gowens, in making his calculations of the termination benefits that were actually paid, recognized and took into account to a degree the fact that defendant had promised not to terminate the plan before August 24, 1994.

calculations of Huffman that are identical to his preferred calculations except for the changes required to convert to 100% vesting and the changes he was required to make to convert from a December 31, 1992, termination date to an August 24, 1994, termination date. The applicable set of calculations is the alternative set that is under Tab L of Agreed Exhibit 139. Those calculations show that the total amount of the underpayments to the Class is $6,745,409, determined as of August 24, 1994. In making those calculations, Huffman properly took into account salary deferrals that would have been required on the part of the plan participants until August 24, 1994, and properly discontinued accruals from date of termination of employment of all participants whose employment terminated between December 31, 1992, and August 24, 1994. The final judgment to be entered in this action will have an allocation of the total amount of the underpayments to those members of the Class who experienced underpayments.

J.

Prejudgment Interest

Both sides recognize that prejudgment interest should be awarded in this case if there is an award of underpayments. Plaintiffs seek 10%, compounded annually; defendant argues that the Texas 6% contract rate, calculated as simple interest, should be used. The United States Court of Appeals for the Fifth Circuit says that "when awarding prejudgment interest in an action brought under ERISA, it is appropriate for the district court to look to state law for guidance in determining the rate of interest." Hansen v. Continental Ins. Co., 940 F.2d 971, 984 (5th Cir. 1991). However, "state law is not binding but merely provides

guidance" and "it is within the discretion of the district court to select an equitable rate of prejudgment interest." Id.

Recently, the Texas Supreme Court has addressed the matter of prejudgment interest in cases like this one where the matter is not specifically addressed by statute. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998). That court has held that, under common law, prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed. Id. at 531. And, prejudgment interest accrues at the rate for post-judgment interest and is computed as simple interest. Id. at 532. Pursuant to TEX. FIN. CODE ANN. § 304.003 (c) (Vernon Supp. 2000), the post-judgment interest rate now applicable is 10% per annum, since the auction rate quoted on a discount basis for fifty-two-week Treasury bills issued by the United States government is less than 10%.

The parties make no arguments as to the date from which prejudgment interest should accrue. Plaintiffs could argue that the time runs from 180 days after March 12, 1993, the date demand was made by persons similarly situated to plaintiffs. See Pls.' Sixth Am. Original Compl., Ex. C. Defendant, on the other hand, could argue that the time should run from the date suit was filed, since plaintiffs themselves did not make written notice of a claim. The court has determined that August 25, 1994, the day after the assumed date of plan termination, should be the date that prejudgment interest begins to accrue.

According to calculations performed by the court, the total of the prejudgment interest chargeable in favor of the Class against defendant is $3,801,454.42 through the date of the signing of this order. The court anticipates that the final

judgment to be entered in this action will show an allocation to each Class member who experienced an underpayment his or her share of the prejudgment interest.

K.

The Appropriate Equitable Relief Being Granted to the Class

The court has concluded that appropriate equitable relief for the Class, and the individual members thereof, will be provided by the award to the members of the Class against defendant of the underpayments in the total amount of $6,745,409 as set forth in the set of calculations under Tab L of Agreed Exhibit 139 plus prejudgment interest thereon consistent with this memorandum opinion. That relief will provide to the members of the Class essentially the same financial benefits they would have received if the plan sponsor had recognized, and given effect to, the accrual and vesting requirements of ERISA and had honored its contractual commitment to continue the MSP in effect until August 24, 1994.

L.

Attorneys' Fees and Other Litigation Expenses

ERISA provides that "[i]n any action under [ERISA]...by a participant...the court in its discretion may allow a reasonable attorneys' fee and cost of action to either party." 29 U.S.C. § 1132(g). When considering whether a statutory fee award is appropriate, the court should consider the following factors: (a) the opposing party's degree of culpability or bad faith; (b) the opposing party's ability to satisfy an award of attorneys, fees; (c) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (d) whether the

party requesting attorneys, fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and, (e) the relative merit of the parties' positions. Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1458 (5th Cir. 1995); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980). No one factor is determinative. Bowen, 624 F.2d at 1266.

Plaintiffs adduced evidence through the testimony of their lead counsel, Robert L. Wright, and exhibits (Agreed Exhibits 178 and 179) that through early November 1999 (slightly more than two weeks prior to the final trial session) plaintiffs had incurred attorneys' fees in the amount of $2,889,743.40 through lawyers with Mr. Wright's firm. Each side used at trial an independent attorney as an expert witness on attorneys, fees, Bill Bowers by the plaintiffs and Jim Barlow by the defendant. The indication from the testimony is that each of the attorney-experts thoroughly familiarized himself with this case and the work done by the firm with which Mr. Wright is associated.

Mr. Wright explained in his testimony the reasons why the lawyers with his firm devoted the time they did to the prosecution of this case, and why that work was necessary to pursuit of the claims being made in this action. He discussed applicability of the facts of this case to each of the Johnson[14] factors. The only question posed to Mr. Wright on cross-examination was whether the value of Mr. Wright's time shown on one of the agreed exhibits was calculated by use of his firm's current hourly rate or by use of the hourly rates in effect as of the time the hours were worked, to which Mr. Wright responded that the hourly rates used were those in use when the case started.

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[14] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

Mr. Bowers testified that the fees incurred by plaintiffs through Mr. Wright's firm about which Mr. Wright had testified are reasonable in this area, and that the time expended by the attorneys was necessary under the circumstances. After having given consideration to the Johnson factors, Mr. Bowers expressed the opinion that an appropriate fee to be received by counsel for the plaintiffs would be twice what the fee charges would be at the normal hourly rates of the attorneys. The sole objective of the cross-examination of Mr. Bowers seems to have been to develop testimony that would persuade the court that Mr. Bowers was incorrect when he expressed the belief that the fees awarded to plaintiffs should be twice the amount derived from use of the normal per-hour rates charged by counsel for the plaintiffs. None of the cross-examination intimated that defendant took issue with the necessity for counsel of plaintiffs in the pursuit of the claims being asserted by plaintiffs in this action to do the work about which Mr. Wright testified his firm did or the reasonableness of the per-hour rates charged for that work.

Mr. Barlow's testimony was directed exclusively to the issue of whether defendants should be required to pay as attorneys' fees more than fees derived from an application of the normal per-hour rates of counsel for the plaintiffs to the time they devoted to the case, all as developed through the testimony of Mr. Wright. His opinion was that there should not be an adjustment up or down on the fees charged by counsel for the plaintiffs, as reflected by their billing statements that were received into evidence as exhibits. He made clear that the opinion he expressed was limited to the issue of whether there should be a recovery by plaintiffs from defendant of attorneys' fees above the lodestar amount and was not directed to the issue of whether counsel for the plaintiffs should be entitled, under the trust fund doctrine,

to receive something above the lodestar from the Class members. Mr. Barlow said that he was not saying by his testimony that counsel for the plaintiffs are not entitled, based on the circumstances of this case, to recover more than their normal per-hour rates, only that the defendant ought not to be required to pay that excess. Defendant's expert did not question the necessity for the accomplishment of any of the work about which Mr. Wright testified, or the reasonableness of any of the charges made by the attorneys for any of that work.

In addition to giving testimony about services rendered by his firm, Mr. Wright identified during his testimony a list of disbursements made by his firm in the total amount of $373,491.93 and an exhibit (Agreed Exhibit 180) that showed time devoted by his co-counsel, Thomas F. Dunn, to work on the case, Mr. Dunn's charges for that time, and expenses incurred by Mr. Dunn's firm. There was no further evidence concerning the disbursements made by Mr. Wright's firm, the work done by Mr. Dunn, or the expenses incurred by Mr. Dunn's firm. No evidence was provided that any of those items were reasonable in amount or that any of the work, disbursements, or expenses were necessary to the prosecution of the claims asserted on behalf of the Class in this action. There was no testimony that would enable the court to conclude that Mr. Dunn's work was not duplicative of the work done by the lawyers in Mr. Wright's firm. Throughout Agreed Exhibit 180 there are entries that Mr. Dunn reviewed documents that apparently were prepared by the other attorneys. There was no evidence that Mr. Dunn's review of those documents contributed at all to the pursuit of the claims asserted in this action. Consequently, the court cannot find from the evidence that there should be any recovery for the disbursements, Mr. Dunn's fees, or the expenses incurred by Mr. Dunn's firm.

However, the court has concluded that the evidence supports a recovery by the Class of the attorneys' fees for work done by Mr. Wright and the lawyers with his firm, as reflected by Agreed Exhibits 178 and 179.

The only argument made by defendant in its post-trial brief against an award to plaintiffs from defendant of attorneys, fees based on normal per-hour rates applied to work actually done is that the court should take into account that plaintiffs are not the prevailing party in the damage phase of this lawsuit. Consequently, the court is not devoting attention to the other factors mentioned in Todd and Bowen other than to note that the court has considered all those factors and has concluded that, in balance, they support an award of attorneys' fees to plaintiffs from defendant. And, the court rejects the argument advanced by defendant in its post-trial brief that plaintiffs are not the prevailing party in the damage phase of this case. As plaintiffs point out in their reply brief, plaintiffs have been successful in many of the issues that have been presented to the court for resolution since conclusion of the liability phase of this case. Pls.', Reply to Defs.' Post-Trial Br. at 38-39.

While the court has not accepted all of the damage theories advanced by counsel for the plaintiffs in support of a larger award, the court is not prepared to say that any damage contention made on behalf of the plaintiffs has been frivolous or made in bad faith. The court is inclined to think that all such contentions were made in a good-faith belief on the part of counsel for the plaintiffs that they were obligated to make the contentions in order to adequately present plaintiffs, case to the court for resolution. The court concludes that plaintiffs were the prevailing party in the damage phase as well as the liability phase of this action.

The court finds that the attorneys' fees incurred through Mr. Wright's firm about which trial evidence was received were necessary to be incurred in the prosecution of plaintiffs, claims against defendant in this action and that all are reasonable in amount to be charged in this geographical area. Therefore, there being no basis in the evidence for a reduction below the lodestar amounts, an award is being made to plaintiffs against defendant for recovery of those fees.

However, the court has concluded that plaintiffs should not recover from defendant any enhancement over the lodestar amounts. Any recovery beyond that would tend to have a punitive effect on defendant. There has been no evidence of any conduct on the part of defendant that would cause the court to believe that defendant should be saddled with attorneys, fees or legal expenses incurred by plaintiffs beyond those that plaintiffs themselves would have paid if they had made timely payment at the usual per-hour rates charged by counsel for the plaintiffs. However, the court reserves for future decision the issue of whether, under the trust fund doctrine, counsel for the plaintiffs should recover some additional amount as attorneys, fees from the Class.

Mr. Wright gave testimony in support of an award to plaintiffs against defendant of attorneys' fees at the district court level beyond the last work reflected by Agreed Exhibits 178 and 179 and for attorney work anticipated in the event of an appeal to the Fifth Circuit and in the further event of an appeal to the United States Supreme Court, saying:

> [W]e anticipate that the amount of time spent trying the case, attending to post-trial

> matters, including motions and briefing and whatever the Court would desire there, together with the amount of time that we would spend in the event of an appeal to the Fifth Circuit, and a further appeal, if allowed to the United States Supreme Court, we're estimating that the total fees for all of that would be an additional $250,000.

Tr. of 11/22/99 trial at 135-36.

The court concludes that it should not make an award for anticipated legal expenses on appeal. If an appeal is taken, the Court of Appeals can deal with the issue of whether attorneys' fees should be awarded for time devoted to such an appeal, either by making the award itself or by directing this court to revisit that issue post-appeal.

In order to resolve the matter of possible recovery by plaintiffs for attorney time devoted to the representation of the Class through the district court beyond the attorney time shown on Agreed Exhibits 178 and 179, the court has signed two orders since the November 22, 1999, trial for the purpose of causing the record to be completed on that matter, one signed March 16, 2000, and the other signed March 24, 2000. The court is accepting as supplementations of the trial record the items submitted for filing by counsel for the Class pursuant to those orders.

In response to the March 16 order, counsel for the plaintiffs made a submission of updated legal expenses showing that (a) the charges for legal services rendered by Mr. Wright's firm from November 4, 1999, through March 13, 2000, are in the total amount of $325,086.50, (b) the

additional disbursements through Mr. Wright's firm are in the total amount of $135,571.06, (c) the charges for services rendered by Mr. Dunn from November 11, 1999, through February 3, 2000, are in the total amount of $6,737.50, and (d) the additional expenses incurred by Mr. Dunn are in the total amount of $34.28.

Mr. Wright says in an affidavit submitted by counsel for the plaintiffs pursuant to the March 24, 2000, order that his clients do not seek recovery as attorneys' fees of the newly listed disbursements of $135,571.06. Inasmuch as there is no evidentiary basis for an award against defendant of any of those disbursements, the court is not allowing recovery of any of them. As no evidentiary basis was provided for an award of the additional fees and expenses incurred through co-counsel Dunn, the court is not making any award based on those fees and expenses.

However, even though the court has concluded that the submitted amount of additional attorneys, fees incurred through Mr. Wright's firm appears to be excessive, the court has concluded that there should be an award of what the court finds to be fees that are reasonable in amount for the additional services that were necessary to prosecute the claims of the plaintiffs. As a starting point, the court has broken down the additional fees incurred through Mr. Wright's firm into three time period categories, the first covering the November 4, 1999, through November 21, 1999, time period, the next covering the date of trial, November 22, 1999, and the third covering the post-trial time period of November 23, 1999, through March 13, 2000. The attorneys' fees incurred by Mr. Wright's firm during the first time period are in the amount of $121,584.50 out of the $325,086.50 total. Mr. Wright's firm charged $9,982.50 for work devoted to this case on the date of trial. The remaining

$193,519.50 out of the $325,086.50 total represents time counsel for plaintiffs say Mr. Wright's firm has devoted to this case since the November 22 trial.

Based on Mr. Wright's affidavit,[15] the court's knowledge of the history of this case and the work done by counsel in the case as reflected by the filings with and appearances before the court, the court's awareness of the legal fees normally charged in this area, and an independent evaluation by the court of the amount of time counsel for the plaintiffs reasonably should have devoted to representation of the Class post-Agreed Exhibits 178 and 179 and the fee charges that should be made for that time, the court makes the following findings and expresses the following conclusions relative to the work done by Mr. Wright's firm commencing on November 4, 1999, and going through March 13, 2000:

(a) the court finds that $121,584.50 is a reasonable charge to be made in this area for the work necessary to be done on behalf of the plaintiffs by way of trial preparation during the November 4, 1999, through November 21, 1999, time period;

(b) the court finds that $9,982.50 is a reasonable amount in this area for the attorneys with Mr. Wright's firm to charge for work necessary to be done on behalf of the plaintiffs in this case

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[15] Though invited by the court to do so, defendant did not respond to Mr. Wright's affidavit or the submission by plaintiffs, counsel of updated legal expenses. See Order of 3/24/00 at 4.

on November 22, 1999, the date of trial;

(c) the court finds that $57,500 is a reasonable charge in this area for work necessary to be done by the attorneys with Mr. Wright's firm in the representation of plaintiffs in this case during the November 23, 1999, to March 13, 2000, time period;

(d) the court concludes, after having considered the factors outlined in Todd and Bowen, that the fee amounts mentioned in (a), (b), and (c) immediately above should be awarded to plaintiffs against defendant; and

(e) the court concludes, after having considered the Johnson factors, that there should be no further adjustment up or down from the lodestar amount in the award made to plaintiffs against defendant for recovery of such attorneys' fees.

For the reasons given above, the judgment of the court will award plaintiffs recovery of $3,078,810.40 as attorneys, fees. The plan of the court is for the judgment to be entered to allocate this award between the Class members on a pro rata basis.

M.

Judgment to be Entered

A judgment will be entered pursuant to this memorandum opinion and order resolving all claims that remain in this case other than a claim for recovery of attorneys, fees and other litigation expenses from the Class by counsel for the plaintiffs. In pursuit of that claim, counsel for plaintiffs must file an appropriate motion. The court tentatively has concluded that independent counsel will have to be retained to represent the Class against present counsel for the plaintiffs on that claim. And, the court tentatively has concluded that if an appeal is taken by either side in this action, the claim for recovery by counsel for the plaintiffs from the Class should be held in abeyance until such an appeal has been concluded. Otherwise, the time devoted to that issue could, and probably would, be wasted if this court's judgment were to be reversed or modified on appeal, bearing in mind that the outcome of a claim by Class counsel for compensation from the Class will depend, at least in part, on the ultimate success plaintiffs experience in their claims against defendant.

So that the claim that remains unresolved cannot be viewed to be an impediment to an appeal at this time, the court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to all claims and issues that were resolved by the memorandum opinion and order the court signed February 18, 1999, in this action and all claims and issues that are being resolved by this memorandum opinion and order. The final judgment will be rendered and subject to entry when a written final judgment is signed by the court.

ORDER

Consistent with the foregoing memorandum opinion and order,

The court ORDERS that the Class have and recover $13,625,673.82 from defendant (representing $6,745,409.00 as underpayments reflected by the calculations under Tab L of Agreed Exhibit 139, $3,801,454.42 as interest on the underpayments, and $3,078,810.40 as attorneys, fees);

The court further ORDERS that plaintiffs have and recover from defendant costs of court incurred by plaintiffs; and

The court further ORDERS that, by April 18, 2000, the parties jointly present to the court by a filed document the text of a proposed final judgment to which they have agreed as to form, drawn consistent with this memorandum opinion and order, and in which there is an award to each member of the Class against defendant of his or her share of the recovery contemplated by this memorandum opinion and order.

SIGNED April 11, 2000.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

Respectfully submitted,

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COUNSEL FOR PETITIONERS

No. 01-348

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOE CARRABBA, JR., et al.,
Individually and on Behalf of
All Others Similarly Situated,

Petitioners,

v.

RANDALLS FOOD MARKETS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED (RESTATED)

Whether pension plan participants can assert a claim for benefits due under 29 U.S.C. § 1132(a)(1)(B) if upon plan termination they received all the benefits they were entitled to receive under the plan, but not all the benefits they were entitled to receive under ERISA?

PARTIES TO THE PROCEEDING

In addition to the persons identified in the Petition for a Writ of Certiorari, Rafael Ferrer is a named Plaintiff. Additionally, the Class Members who are not named Plaintiffs are:

Acker, Ricky
Adamcik, Ben
Adams, Alan
Allen, Dodd
Allen, Phillip
Anderson Sr., Jeff
Anderson, John
Arledge, Tom
Autry, Anthony
Avery, James
Barron, Glendon
Barrow, Charles
Beaird, Walter
Becker, Greg
Becker, Steve
Blanton, Scott
Boatright, Greg
Boniol, Michael
Bourland, Ronny
Boyles, Sanford
Brackett, Tommy
Brisko, Thomas
Bronstein, Neil
Brooks, Lewis
Brown, Velma
Burke, Thomas
Burleson, Cynthia
Butler, Gary
Call, Dale
Capley, Luther
Carlyle, Kevin
Carter, Eddy
Cawyer, Roscoe
Chasteen, Anthony
Cluff, Kathy
Colbert, Anthony
Cook, Barry
Cooper, Bill
Cooper, George
Cox Jr., Elmer
Cox, James
Crawford, Marsha
Cruz, Julie Saldana
Cullum, Brooks
Curtis-Powell, Leanne
Dalton, David
Danford, Gary
Davis, Jimmy
Davis, Kenneth
Dayton, Greg
De Zeeuw, Mark
Dean, Dona
Deibler, Mark
Dietert, Douglas
Dolphin, Robert
Dowling, Jeffery

PARTIES TO THE PROCEEDING – Continued

Dubois, Parry
Ducote, Neil
Duggan, Greg
Duncan, Fred
Dyer, Harold S.
Ely, Gary
Embree, Barry
Embree, Julia
England Jr., Ray
Esquivel, David
Eure, Clyde
Evans Jr., Jack
Farley, Chris
Figura, Tim
Forsythe, James
Freeman, James
Fry, Cynthia Williams
Fry, Ron
Gale, Cristi Curtsinger
Garcia, David
Gay, Richard
Gonzalez, Leon
Goodwin, William
Gravley, Lowery F.
Green, Joe T.
Greenlee, Robert
Gregg, Kimberlyn
Hardy, Kirby
Harrell, Lisa
Harrison, Dorothy
Headrick, Jerry
Henry, Jeff
Hertel, William
Hill, Gregg
Hiltz, Richard
Hobbs, Robert
Holmes, Billy
Holmes, Houston
Holsemback, Terry
Hoskins, J.D.
Hubbard, Everett
Huff, Robert
Infante, Juan
Jack, Dan
Jensen, Patricia
Johnson, Doyle
Jordan, Kenneth
Kelley, Tom H.
Kelly, Claire
King Jr., James
Kirkpatrick, Jay
Kizer, Gary
Knox, Rebecca
Kruse, Melvin
Kuhn, Julie
Kuhn, Melvin
Landess, Richard
Laws, Patricia
Lawson Jr., Daniel
Lawson, Susan Barre
Lewis, Hugh
Loonan, Mike
Losawyer, Mike
Luttrell, Larry
Mahaffey, Monica
Mahoney, Greg

PARTIES TO THE PROCEEDING – Continued

Marcangelo, John
Martin, Robert
Martinez, Juan
Mathews, Dina Winn
Matthews, Brent
Maupin, William "Hank"
McCarthy, J.K.
McCullin, James
McGowan Jr., M.L.
McKnight, Richard
Meadors, Donald
Michels, James
Mix, John
Moore, William
Morreira, Karen
Naik, Ketan
Needham, Donald
Neiman, Rosario M.
Nelson, Elijah
Parrish, Jimmy
Partee, Charles
Pawless, Joy
Pawlick, Dale
Peck, Matt
Pels, Kevin
Peters, Ronald
Petersen, Patti
Phillips, Eddie
Phillips, Melinda Simmons
Pidgeon, Thurman
Pierson, Kerry
Plemons, Michael
Pollard, Rock
Pratt, Becky
Puetz, Gerry
Rangel, Sam
Reece, Thomas
Reswik, Timothy
Risner, Charles
Rodgers, Scott
Rodriguez, Efrain
Rodriguez, Roland
Rohrer, John
Rothmeyer, K.
Roussell, John
Scoggins, Frances
Settle, Leslie
Shackelford, Tom
Shedenhelm, Larry
Shermer, Dayton
Shipley, Thomas L.
Shivers, John
Skipworth, Ronald
Slovacek, Yvonne
Smith, Dennis
Smith, Marilyn
Sneed, Langford
Song, Dennis
Spofford, David
Stark, Barbara
Stiles, James
Tate, Chris
Taylor, Mike
Teague, William M.
Tort, Mario
Trapp, Stephen
Traver, Bert
Treadway, Lee
Trewin, Ellen
Tribble, Patricia

PARTIES TO THE PROCEEDING – Continued

Turner, Tommy
Tuttle, Lonnie
Wallick, Scott
Ward, Judy
Warner, Jeff
Warren, Wendell
Washington, Archie
Wilkinson, Lua
Willey, William
Williams, Benny
Williams, James
Williams, John
Wilson, James
Witherington, Richard
Wong, Alex
Woodson, Douglas
Youngblood, Mike
Zigrang, William

The Respondent is Randalls Food Markets, Inc. Respondent is a wholly-owned subsidiary of Safeway Inc.

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STATUTES INVOLVED

In addition to the statutes reproduced in Plaintiffs' Petition for a Writ of Certiorari, the following statutes are at issue in this lawsuit:

29 U.S.C. § 1051(2)
29 U.S.C. § 1053(a)
29 U.S.C. § 1054(a), (b)
29 U.S.C. § 1132(a)

Pursuant to SUP. CT. R. 24(f), the relevant text of these statutes is set out verbatim in the Appendix to Respondent's Brief in Opposition.

STATEMENT OF THE CASE

I. Background to this Lawsuit.

This lawsuit concerns a "top hat" pension plan that Cullum Companies, Inc. ("Cullum"), a Texas-based grocery chain, established in 1974 for its management. The plan was known as the Management Security Plan (the "MSP" or the "Plan"). Under ERISA, which was enacted in the same year, a top hat plan is

> a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

29 U.S.C. § 1051(2). As the district court found, Cullum intended the MSP to be a top hat plan and structured it to satisfy that exception. (App. at 8-10, 16-18)[1]

Top hat plans are not subject to ERISA's minimum vesting and accrual requirements.[2] *See* 29 U.S.C. § 1051(2). Believing the MSP was a top hat plan, Cullum did not draft it to comply with these minimum requirements. For instance, the MSP's basic plan document provided that a participant's benefits neither vested nor accrued until retirement. (AX 3 ¶¶ 4.4, 4.5) Paragraph 4.1 of the basic plan document, which every participant received, expressly set forth the conditional nature of these benefits:

> *If* a Participant has remained an Employee until age sixty-five (65) and shall then Retire, and *if* this Program and his Plan Agreement have been kept in force, the Company will pay or cause to be paid to such Participant as a Retirement Benefit (herein so called), the amount per month specified in his Plan Agreement.

(AX 3 ¶ 4.1) (emphasis added))

Thus, a key condition to the receipt of a retirement benefit was that the MSP itself remain in existence. But

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[1] "App." refers to the Appendix that Plaintiffs filed with their Petition for a Writ of Certiorari.

[2] ERISA requires pension plans to accrue and vest pensioners' benefits at certain minimum rates. *See* 29 U.S.C. §§ 1053(a), 1054(b). The accrual provisions require employers to credit pensioners with a certain portion of their retirement benefit each year they participate in the plan. Vesting measures what amount of the accrued benefit cannot be eliminated.

the basic plan document clearly warned participants that the MSP could be terminated at any time:

> The Company reserves the right to terminate, amend, modify or supplement this Program, wholly or partially, and from time to time, at any time. . . . Upon the termination of this Program or any Plan Agreements, . . . neither this Program nor the Plan Agreement shall be of any further force and effect, and no party shall have any further obligation under either this Program or any Plan Agreement so terminated.

(AX 3 ¶¶ 10.1, 10.2) The plan agreements that participants executed each year also expressly stated that Cullum "reserves the right to terminate any employee's participation in the Plan or to terminate or modify the terms, conditions, or benefits provided by the Plan." (AX 3, Annex I ¶ 7) In signing the plan agreement, each participant also acknowledged,

> I understand that the Plan and this Plan Agreement may be terminated at any time, in the sole discretion of the Company, without any obligation of any nature whatsoever to the Company, except a Participant shall have those rights provided for [to] the extent such may be applicable to him at the time of such termination.

(AX 3, Annex I)

The plan agreements detailed what participants would receive if Cullum terminated the Plan. They disclosed that "upon any termination of the Plan, the Company, after payment of all involuntary termination benefits, may in its absolute discretion pay any additional benefits the Committee may determine." (AX 3, Annex I

¶ 7) The only involuntary termination benefit under the MSP was "an amount equivalent to all of [the participant's] deferrals to the Plan." (AX 3, Annex I ¶ 6)

In 1992 Randalls Food Markets, Inc. ("Randalls") acquired Cullum. Consistent with the Plan's terms, Cullum had advised Randalls during their negotiations that if Randalls terminated the MSP, it would owe the participants only the return of the salary deferrals they had made while participating in the Plan. Randalls subsequently elected to terminate the MSP. When Randalls terminated the Plan it paid each participant at least the amount of his or her salary deferrals, with many long-term employees receiving additional amounts based on their years of service.

II. History of this Lawsuit.

Plaintiffs are former Cullum employees who were participating in the MSP when it was terminated. In 1996 they filed this class action lawsuit against Randalls, alleging that the MSP was not an exempt top hat plan and seeking to recover the additional retirement benefits they claimed would be due them if the MSP had been subject to ERISA's vesting and accrual requirements. Because Plaintiffs would have a claim only if the MSP were not an exempt top hat plan, the district court first considered that issue. The court certified for trial a mandatory class consisting of all MSP participants at the time the Plan terminated (the "Class"). (App. at 4) After a bench trial, the court issued its opinion on February 18, 1999. *See Carrabba v. Randalls Food Markets, Inc.*, 38 F. Supp. 2d 468 (N.D. Tex. 1999). (App. at 2-23) While the court found

that Cullum "at all times intended the MSP to be a top hat plan and operated on a good-faith belief that it so qualified," it nonetheless concluded that Randalls had not established that the MSP was a top hat plan. (App. at 21-22)

In the second phase of the trial proceedings, the court considered the relief due the Class. To determine the Class's remedy for the MSP's failure to comply with ERISA's minimum vesting and accrual requirements, the court applied ERISA's civil action provision, 29 U.S.C. § 1132(a). Two of the potential remedies available under that section are relevant in this case:

- Section 1132(a)(1)(B) provides what Plaintiffs concede is a "breach of contract type remedy" under which a plan participant can recover the benefits due him under the terms of the plan. (Petition at 8)

- Section 1132(a)(3) allows courts to fashion "appropriate equitable relief . . . to redress any act or practice which violates any provision of [ERISA]."

After a second bench trial, the district court issued its opinion on April 11, 2000. *See Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763 (N.D. Tex. 2000). (App. at 24-58) The court concluded that the plan participants did not have a Section 1132(a)(1)(B) claim because they had received all they were entitled to receive under the strict terms of the Plan, the return of their salary deferrals. (App. at 34-35) Instead, the court determined that the Class was entitled to "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3).

The district court concluded that "equity would be served" if the Class was put in the same financial position it would have occupied had Cullum complied with ERISA's minimum vesting and accrual requirements. (App. at 35) Based on the actuarial evidence presented at the trial, the court awarded the Class $6.7 million. This award gave the Class "essentially the same financial benefits they would have received if the plan sponsor had recognized, and given effect to, the accrual and vesting requirements of ERISA." (App. at 46)

Plaintiffs want more. They contend that they are entitled to all the benefits that would have accrued to them in the future had the MSP not been terminated and had they continued to participate in the MSP until they retired at age 65 – a figure of $180 million. (Petition at 9) The Fifth Circuit rejected this argument and affirmed the district court's "conscientious, well-reasoned opinions." *See Carrabba v. Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001). (App. at 1) Because the Fifth Circuit's decision was correct, this Court should not grant Plaintiffs' Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Section 1132(a)(1)(B) provides a remedy where plan participants do not receive all they are entitled to receive under the strict terms of a benefit plan. In this case, Randalls paid Plaintiffs all they were entitled to receive under the MSP upon its termination. Consequently, the Fifth Circuit properly held that Plaintiffs could not recover under Section 1132(a)(1)(B). Plaintiffs argue that

they had a claim for benefits due under the Plan if the court ignored its "illegal" vesting and accrual provisions. This argument is founded not on the strict terms of the Plan, but rather on an assumption regarding vesting and accrual that Plaintiffs contend the court should have used in place of the "illegal" vesting and accrual provisions – namely, that Plaintiffs' benefits had fully vested and accrued immediately upon their entry into the Plan. However, there is no legal, factual, or equitable basis for their argument that the court was required to indulge this assumption. Indeed, Plaintiffs cannot cite a single case in which a court has ever done so.

Section 1132(a)(3) authorizes equitable relief where pensioners received all they were entitled to receive under the terms of a plan, but not all the benefits they were entitled to receive under ERISA. Because Plaintiffs' claims arose from their failure to receive the benefits that ERISA required to be vested and accrued, the district court's decision to award equitable relief was entirely proper. The court fully vindicated ERISA and its objectives by awarding Plaintiffs the additional benefits that ERISA required to be vested and accrued. This award was not an abuse of discretion.

Moreover, this case does not present important issues on which the lower federal courts need guidance. The issue in this case does not arise frequently, and the results have not been controversial. In addition, despite their attempts to manufacture a "conflict," Plaintiffs cannot identify a decision by this Court or a court of appeals that conflicts with the Fifth Circuit's *per curiam* decision in this

case. Consequently, this Court should not grant the Petition for a Writ of Certiorari. *See generally* SUP. CT. R. 10.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit properly concluded that petitioners did not have a claim for benefits due.

A. Plaintiffs cannot assert a claim for benefits due because Randalls paid them everything they were entitled to receive under the MSP.

Plaintiffs cannot assert a claim for benefits due under Section 1132(a)(1)(B) because they got everything they were entitled to receive under the Plan. Section 1132(a)(1)(B) creates a statutory cause of action for breach of contract. It authorizes a plan participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). It applies "[w]hen a beneficiary simply wants what was supposed to have been distributed under the plan." *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1335 (5th Cir. 1992); *see also Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000). Any recovery greater than a participant is entitled to receive under a plan's strict terms is an impermissible award of extra-contractual damages. *See Corcoran*, 965 F.2d at 1335. As this Court has established, extra-contractual damages are not recoverable under Section 1132(a)(1)(B). *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985).

As the district court found, the MSP provided that participants were entitled only to the return of their salary deferrals upon plan termination. (App. at 33) Plaintiffs do not dispute this finding. (Petition at 6) The district court also found that each of the participants received at least their total salary deferrals upon plan termination. (App. at 34-35) Plaintiffs do not dispute this finding either. Therefore, the Fifth Circuit correctly held that Plaintiffs did not have a claim for benefits due. *See generally Corcoran*, 965 F.2d at 1335.

B. Plaintiffs cannot recover the benefits they had hoped to receive when they retired at age 65 under the guise of a claim for benefits due.

1. Plaintiffs' damages theory requires this Court to assume that their age 65 benefits fully accrued and vested the instant they joined the MSP.

Plaintiffs do not claim that they were entitled to recover under the MSP's literal terms. Instead, they argue that when resolving the Section 1132(a)(1)(B) claim the Fifth Circuit was obligated to ignore the Plan's "illegal" terms – that is, the provisions that failed to comply with ERISA's vesting and accrual requirements. (Petition at 9-10) However, simply ignoring those provisions would not do Plaintiffs any good, as the Plan then would be silent as to how to measure the vested and accrued benefits due the participants upon plan termination. Therefore, Plaintiffs also contend that the Fifth Circuit was required to assume as a matter of law that each participant's age 65 retirement benefit was fully accrued and vested the instant he first joined the Plan. Consequently,

according to Plaintiffs, when Randalls terminated the MSP it was obligated to pay each participant his age 65 retirement benefit.

Neither logic nor the evidence at trial supports such an assumption. Under Plaintiffs' theory, a 25-year-old could join the MSP on day one, quit work on day two, and be entitled to a fully accrued and vested retirement benefit at age 65. For example, Plaintiffs claim that Julia Embree is entitled to a $915,889 retirement benefit even though she was only 27 and had worked for Cullum for only 2.19 years when the MSP was terminated. (38 R. 9382; AX 138, Tab B) Several other Class Members also each "earned" retirement benefits of over $840,000 even though they were less than thirty years old and had worked at Cullum less than three years when the MSP was terminated. (38 R. 9382; AX 138, Tab B) If Plaintiffs are correct, these young participants accrued far greater retirement benefits than higher-salaried executives who had worked for Cullum for many years and participated in the MSP since its inception in 1974. (38 R. 9380-81, 9385; AX 138, Tab B)

The uncontradicted evidence at trial was that no such pension plan would ever exist in the real world. Plaintiffs' own pension plan expert conceded that ERISA does not require benefits to fully vest and accrue immediately upon entry into a plan. (49 R. 102) He further conceded that ERISA plans do not normally operate this way, but rather accrue benefits ratably over time. (49 R. 102-03) Randalls' pension plan expert testified that he has never seen an ERISA plan that provided for immediate vesting and accrual of benefits. (49 R. 240) In his opinion, no company would ever adopt such a plan because it would

be too expensive and would provide no incentive for employees to stay with the company. (49 R. 241-42) In short, the plan that Plaintiffs argue the court was required to assume is one that no rational employer would ever give its employees.

More importantly, the fact that Plaintiffs are required to substitute assumptions about vesting and accrual for the Plan's unlawful terms demonstrates that they do not have a claim for benefits due under the strict terms of the Plan. Rather, as the distict court properly found, their remedy must be an equitable remedy to redress the violations of ERISA the court found. Plaintiffs' real quarrel is with the district court's equitable remedy. But that was a matter committed to the court's discretion.

2. Plaintiffs' unprecedented theory conflicts with the decisions of other courts considering this issue.

Plaintiffs' theory of relief is unprecedented. They can cite no ERISA case authorizing the windfall they seek. In other contexts the federal courts have uniformly held that if a plan's vesting or accrual provisions do not satisfy ERISA's minimum requirements, the appropriate remedy is to maintain the plan's original intent as to accrual and vesting to the extent possible while bringing it into compliance with ERISA's requirements. *E.g., Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 267 (S.D.N.Y. 1997); *Montgomery v. Lowe*, 507 F. Supp. 618, 622 (S.D. Tex. 1981); *Ramirez v. Lowe*, 504 F. Supp. 21, 23 (S.D. Tex. 1979), *aff'd*, 639 F.2d 306 (5th Cir. 1980);

Nedrow v. McFarlane & Hayes Co. Employees' Profit Sharing Plan & Trust, 476 F. Supp. 934, 937 (E.D. Mich. 1979).

Likewise, the Tenth Circuit has explicitly rejected the argument that a plan's failure to contain a vesting provision that complied with ERISA meant that the court was required to assume that participants' benefits fully vested the instant they joined the plan:

> Employee's argument on the effect of ERISA's noncompliance fails to establish the benefit plan provided for vesting. Something more than just the failure of the employer to comply with its duties under ERISA is necessary to establish a right to alleged benefits. Otherwise, ERISA would be turned into a strict liability statute: any time the employer failed to comply with its duties under ERISA, an employee would receive any alleged benefit he or she claims they expected.

Hein v. TechAmerica Group, Inc., 17 F.3d 1278, 1280 (10th Cir. 1994) (footnote omitted).

No court has ever deemed participants' benefits fully vested and accrued because a plan failed to satisfy ERISA's minimum vesting and accrual requirements. The only case Plaintiffs cite that considered the proper remedy in this situation is *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421, 1444-45 (M.D. Ala. 1990). (Petition at 13) That case does not support their position. In *Hollingshead*, Burford was sued after it stopped making payments on an unwritten, informal pension plan. The court rejected Burford's argument that the plan was an exempt top hat plan and exercised its equitable power to award the employees the present value of their accrued benefits.

It did not award damages under Section 1132(a)(1)(B). *See Hollingshead*, 747 F. Supp. at 1444-45. Contrary to Plaintiffs' implication, the court did not simply assume that the absence of valid vesting and accrual schedules meant that the benefits were fully vested and accrued. Instead, the court looked to the plan's intent to determine the amount of accrued benefits. Ultimately the court selected an accrual formula that complied with ERISA and was consistent with the plan's intent. *Id.*; *see also Hollingshead v. Burford Equip. Co.*, 809 F. Supp. 906, 912-16 (M.D. Ala. 1992). This approach was entirely consistent with that taken in the *Hummell* line of cases discussed above as well as that taken by the district court in this case.

3. The Fifth Circuit's decision fully vindicated the policies recognized by this Court in *Central States*.

Plaintiffs assert that the Fifth Circuit's decision contradicts general ERISA principles recognized by this Court in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) regarding (1) the policies underpinning ERISA, and (2) the need to protect promised benefits. (Petition at 14-16) *Central States* did not even involve a Section 1132 claim, but rather whether employee benefit plans were entitled to audit certain employer personnel records. Its holdings are thus wholly irrelevant to this case. Moreover, the general ERISA principles discussed in *Central States* provide no support for Plaintiffs' damage theory.

First, Plaintiffs assert that the Fifth Circuit's decision conflicts with the policy recognized in *Central States* of

"protect[ing] the continued well-being and security of employees and their dependents directly affected by ERISA plans." (Petition at 14) But they do not explain how the damages award undermines this policy. Certainly the mere fact that ERISA was designed to protect pensioners does not mean that pensioners automatically win any ERISA lawsuit:

> "No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."

PBGC v. LTV Corp., 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)). Reaffirming this principle several years later, this Court recognized that ERISA is "an enormously complex and detailed statute that resolves innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993).

As part of this balancing, ERISA gives employers considerable flexibility when structuring pension plans. For instance, employers are not required to accrue or vest retirement benefits at any faster rate than set forth in ERISA's minimum vesting and accrual schedules. An employer can choose whichever accrual method the employer deems most advantageous to itself, as long as it complies with ERISA's minimum requirements. *See, e.g., Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1490 (D.S.C.

1991). Because ERISA gives employers this flexibility, courts are reluctant to impose vesting and accrual obligations greater than the statutory minimums:

> "Extra-ERISA commitments must be found in the plan documents and must be stated in clear and express language." . . . "Courts may not lightly infer an intent" on the part of a plan to "voluntarily undertake an obligation to provide vested, unalterable benefits."

Spacek v. Maritime Ass'n, ILA Pension Plan, 134 F.3d 283, 293 (5th Cir. 1998) (quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993) and *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994)).

In addition, ERISA gives employers the absolute right to terminate pension plans. *See generally* 29 U.S.C. § 1341(a); *LTV Corp.*, 496 U.S. at 638. Upon termination of a plan an employer is required to pay participants only those benefits that have already accrued and vested under the plan's accrual and vesting schedules. *E.g., In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983); *PBGC v. Heppenstall Co.*, 633 F.2d 293, 301-02 (3d Cir. 1980); *Berard v. Royal Elec., Inc.*, 795 F. Supp. 519, 524 (D.R.I. 1992). As the Fifth Circuit has held, upon plan termination "an employer must satisfy only the employees' *accrued* benefits under the plan – not benefits that would accrue in the future if the employees continued to work for the employer." *May v. Houston Post Pension Plan*, 898 F.2d 1068, 1070 (5th Cir. 1990) (emphasis in original). Indeed, "[n]o case has ever held that, when a defined benefit plan terminates, an employer is required to pay an employee retirement benefits based on future years of service not yet worked." *Blessitt v. Retirement*

Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1172 (11th Cir. 1988). To the contrary, "benefit accrual ceases when a plan terminates." *Id.* at 1171.

Thus, nothing in ERISA supports the idea that the Fifth Circuit was obligated to treat Plaintiffs' benefits as fully vested and accrued as a matter of public policy. Against this legal backdrop, the district court properly recognized that awarding damages based on ERISA's minimum vesting and accrual schedules fully vindicated the Congressional policy of assuring the "equitable character" of pension plans. (App. at 39)

Second, Plaintiffs assert that when Randalls terminated the MSP it was required to pay the participants their full age 65 benefits because they had been "promised" by Cullum. (*E.g.*, Petition at 5-6, 14-15) However, as previously explained, the MSP expressly stated that Cullum could terminate the MSP and pay the participants only the money they had paid into the Plan. The district court found that no

> representation was made by the employer to the participants that would justify a reasonable belief by the participants that . . . their rights under the MSP were greater than, or different from, the rights and obligations described in the plan document and the plan agreements . . . .

(App. at 33)

Plaintiffs simply will not accept this finding of fact. Instead, Plaintiffs contend that the MSP's unexpressed "lawful terms" promised them the benefits to which they would have been entitled had the Plan remained in force and had they continued to participate in the Plan until

they reached the retirement age of 65. (*E.g.*, Petition at 8-10, 14-15) This argument simply twists the employer's alleged promise. The plan documents expressly provided that the Plan could be terminated at any time. Nothing in the Plan suggested, much less stated, that upon termination the MSP participants would receive all the benefits they would have received if the Plan had not been terminated and they remained in the Plan until they retired at age 65. As the district court found, there was no forfeiture of any "promised" benefits.

4. Neither ERISA's fiduciary duty provision nor trust law supports the conclusion that Plaintiffs' age 65 benefits were fully vested and accrued.

Plaintiffs also argue that ERISA's fiduciary duty provision (29 U.S.C. § 1104) requires fiduciaries to follow plan documents only "insofar as such documents are . . . consistent with the provisions of this title [ERISA]." (Petition at 11) Relying on this language, Plaintiffs extrapolate that Section 1104 required the Fifth Circuit to assume that the participants' age 65 benefits were fully vested and accrued when they entered the Plan. Plaintiffs' extensive reliance on *Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) underscores the weakness of this argument. *Northeast Department* neither involved a pension plan nor addressed the remedy for a plan's failure to comply with ERISA's vesting and accrual requirements. In that declaratory judgment action two benefit plans had denied health benefits to an insured on the basis that the other plan covered her treatment. *See id.*

at 150. In particular, one of the plans contained an "escape clause" that purported to exclude insurance coverage in its entirety if the insured was also covered by other health insurance. *See id.* at 160-61. The Third Circuit held that the trustees of this plan violated their fiduciary duties by including this escape clause because it deprived participants of benefits that they reasonably expected. Consequently, the court concluded, the clause was unenforceable. *See id.* at 163-64. In our case, the district court ignored the plan provisions that, in its view, violated ERISA and exercised its discretion to award the amount of benefits that ERISA protected. Thus, the district court's ruling complied with any directive in Section 1104 to ignore plan terms that are contrary to ERISA. There is no conflict between this case and *Northeast Department*.

Plaintiffs' remaining fiduciary duty authority does not dictate a different result. Those cases merely state that a fiduciary must disregard plan provisions to the extent they conflict with ERISA. (Petition at 12-13) The district court's award of equitable relief based on ERISA's requirements fulfilled any obligation to disregard provisions to the extent they conflict with ERISA. These cases do not support Plaintiffs' leap in logic that their full age 65 benefits must be deemed fully vested and accrued as a matter of law.

Plaintiffs also cite general trust law principles to support their argument that the Fifth Circuit was required to assume their benefits fully vested and accrued as soon as they joined the MSP. (Petition at 16-17) However, this Court has held that "[a]lthough trust law may offer a 'starting point' for analysis in some situations, it must give way if it is inconsistent with 'the

language of the statute, its structure, or its purposes.' " *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). Plaintiffs concede that trust law is relevant only "to the extent compatible with ERISA." (Petition at 16) As we have previously discussed, many courts have already considered the issue of what remedy to provide for the failure of an ERISA plan to comply with the minimum vesting or accrual requirements. Not one has ever answered the question by reference to general principles of trust law. Invariably, they are guided by ERISA's minimum vesting and accrual requirements themselves. That is, they reform the plan to the extent necessary to bring it into compliance with ERISA's minimum requirements while maintaining the plan's original intent. Consequently, there is no room for applying general trust law principles to the statute-specific issue of vesting and accrual of benefits.

5. None of ERISA's remaining statutory provisions supports Plaintiffs' argument.

Plaintiffs also cite ERISA's definitions of the terms "nonforfeitable" and "accrued benefit" to justify their argument that setting aside the "illegal" provisions means that their age 65 retirement benefits were fully vested and accrued. *See* 29 U.S.C. §§ 1002(19), 1002(23)(A). (Petition at 17-19) These statutory provisions merely state that the amount of the vested and accrued benefit is determined by looking to the plan's terms. They do not establish the remedy for violations of ERISA's minimum vesting and accrual requirements. Similarly, 29 U.S.C. § 1102(a)'s requirement that a plan be in writing is

irrelevant here. (Petition at 19-20) The MSP was written; the fact that its written terms did not comply with ERISA's vesting and accrual requirements does not mean that participants' benefits were fully vested and accrued. *See, e.g., Hein*, 17 F.3d at 1280-81; *Hollingshead*, 809 F. Supp. at 912-16.

II. The award of equitable relief was not an abuse of discretion.

Because Plaintiffs did not have a claim for benefits due, the district court based its remedy on Section 1132(a)(3), which authorizes civil actions "to obtain other appropriate equitable relief . . . to redress any act or practice which violates any provision of [ERISA]." This provision creates an equitable remedy where, as here, a plan participant gets everything he is entitled to receive under the terms of a plan, but not everything he is entitled to receive under ERISA. Because Plaintiffs did not have a claim for benefits due, the decision to award equitable relief was proper.

Plaintiffs cannot and do not contend that the district court's choice of equitable relief was an abuse of discretion. The award put the Class in the financial position they would have occupied had the MSP complied with ERISA's minimum vesting and accrual provisions. The logic behind this award was sound. Had the MSP complied with ERISA's statutory minimums, Randalls would have had the right to terminate the MSP and pay the Class only benefits calculated in accordance with those minimums. In that event, the Class would have received ERISA's protections and they would have had no claim

against Randalls. Thus, this equitable remedy fully vindicated ERISA's objectives.

While Plaintiffs do not directly attack the nature of the equitable relief, they complain that the district court used a hypothetical accrual method and allowed Randalls to create a new plan. (*E.g.*, Petition at 9, 13-14) In fashioning its equitable remedy, the district court did not allow Randalls to create a new plan. To the contrary, the court simply applied ERISA's vesting and accrual requirements to determine what benefits were statutorily protected. That relief was not an abuse of discretion. In fact, it is Plaintiffs who seek to create a new plan. Under the guise of a claim for benefits due they would have this Court convert the MSP from a plan in which benefits vested and accrued at retirement into a plan in which benefits fully vested and accrued upon entry into the plan. There is no legal, logical, or equitable basis for that result.[3]

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[3] Plaintiffs also assert that the district court's decision encourages employers to violate ERISA because they can always adopt a new plan *ex post facto*. (Petition at 13-14) But Section 1132(a)(3) gives the district court discretion to determine what is "appropriate equitable relief." The district court found that Cullum believed in good faith that the MSP was a top hat plan. (App. at 8-10, 16-18) Plaintiffs do not challenge that finding and do not contend that the district court abused its discretion in fashioning the Class's appropriate equitable relief. There is no need for this Court to offer an advisory opinion on the question of whether employers can be obligated to pay more than the statutory minimums if they deliberately flout ERISA.

III. In any event, the question presented by the petition does not need Supreme Court resolution.

Finally, this case does not present an important federal issue on which the lower federal courts need guidance from this Court. This case concerns an issue that to our knowledge no other court has considered: Where a court concludes that a terminated pension plan was not an exempt top hat plan, what is the remedy for plan participants who were not paid upon plan termination the amount of benefits that ERISA required to be vested and accrued? Although ERISA was created 27 years ago, only one other case that we know of – *Hollingshead* – has presented even the more general question of the remedy available to pension plan participants when an ostensibly-exempt top hat plan that does not comply with ERISA's vesting and accrual requirements is found not to be a top hat plan. However, in other contexts the lower federal courts have fashioned the very sensible rule that the remedy for violations of ERISA's minimum vesting and accrual requirements is measured by the amount necessary to bring the plan in question into compliance with those statutory requirements. This remedy fully satisfies ERISA and its underlying policies. In this case the trial court adopted that same approach, and the Fifth Circuit concurred.

Contrary to Plaintiffs' argument, the Fifth Circuit's decision does not conflict with any decision of this Court, and there is no split among the circuits. Plaintiffs' reliance on this Court's decision in *Central States* and the Third Circuit's decision in *Northeast Department* – neither of which even involved ERISA's vesting and accrual

requirements – highlights the absence of a basis for Plaintiffs' position. Accordingly, no reason exists for this Court to grant the petition. *See* SUP. CT. R. 10.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 01-348

In The

Supreme Court of the United States

JOE CARRABBA, JR., Et Al., Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

RANDALLS FOOD MARKETS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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29 U.S.C. § 1051(2): Coverage.

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than . . . (2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. . . .

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29 U.S.C. § 1053(a): Minimum Vesting Standards.

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service: The nonforfeitable percentage is:

3	20
4	40
5	60
6	80
7 or more	100

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29 U.S.C. § 1054(a), (b): Benefit Accrual Requirements.

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and – (1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section. . . .

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than –

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of

age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of $33^1/_3$) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than $133^1/_3$ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph –

(i) any amendment to the plan which is in effect for the current year shall be

treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation

from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

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29 U.S.C. § 1132(a): Civil Enforcement.

(a) Persons entitled to bring a civil action.

A civil action may be brought

(1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

. . .

(3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief.

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In the
SUPREME COURT OF THE UNITED STATES

JOE CARRABBA, JR., ET AL.,
Individually and on Behalf of
All Others Similarly Situated, *Petitioners*,

v.

RANDALLS FOOD MARKETS, INC., *Respondent*.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

A. Randalls fails to refute the existence of a direct conflict among the circuits on an important point of federal law.

Petitioners submitted a single, straightforward issue:

> Where a court determines that an ERISA plan contains illegal terms, may that court nevertheless apply those illegal terms when determining a plan participant's claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B)?

Petitioners asked this Court to address this issue for two reasons. First, the Fifth Circuit's holding in this case conflicts with the Third Circuit's holding in *Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 529 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) that, when determining a participant's claim for benefits under 29 U.S.C. § 1132(a)(1)(B), the court is required by 29 U.S.C. § 1140(a)(1)(D) to ignore illegal terms that would forfeit benefits otherwise promised under the plan's lawful terms. Second, the answer to this question is essential to the orderly administration of ERISA benefit plans. If, as the Fifth Circuit held, illegal forfeiture, non-accrual, or non-vesting terms are valid to defeat a claim under section 1132(a)(1)(B) to recover specific benefits stated in the plan documents, employers and practitioners need to know that so they can be sure to include such illegal terms in their plans and effectively eliminate the section 1132(a)(1)(B) remedy from ERISA. On the other hand, if as the Third Circuit held, illegal terms are void and the plan is construed in their absence, employers

and practitioners need to know that so they will establish and maintain their benefit plans according to the law.

The sole question currently before this Court is whether the circuits are split on a substantial issue under an important federal statute and whether the Fifth Circuit holding conflicts with principles this Court established in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport Inc.*, 472 U.S. 559 (1985). Randalls does not dispute that ERISA is an important federal statute designed to protect American workers. And there are few issues more threatening to Congress's goals for ERISA than the premise that an employer can lawfully eliminate a claim under section 1132(a)(1)(B) by simply putting illegal terms in their plans. Moreover, Randalls does not dispute that the Third Circuit in *Northeast Department* held that section 1104(a)(1)(D) requires fiduciaries, like Randalls, when determining the amount due under a section 1132(a)(1)(B) claim for benefits, to ignore illegal terms in the plan and award the amount required under the plan's remaining lawful terms. Nor does Randalls contest that the MSP promises petitioners specific retirement benefits conditioned only on illegal forfeiture, non-accrual and non-vesting provisions. Finally, it is undisputed that the Fifth Circuit invoked illegal terms in the MSP to deny petitioners' section 1132(a)(1)(B) remedy.

Petitioners identified a direct conflict regarding the effect of illegal terms in an ERISA protected benefit plan. Instead of addressing that conflict, Randalls directs its response to issues that are not and will not be before this Court - attempts to justify the equitable relief awarded by the Fifth Circuit. By ignoring the true issues and focusing on

non-issues, Randalls tacitly concedes the conflict's existence and materiality.

ERISA provides and the Third Circuit holds that the courts should ignore a plan's illegal forfeiture conditions and should award the plan's otherwise unconditional benefits. The Fifth Circuit, however, holds that courts should enforce illegal forfeitures, deny a section 1132(a)(1)(B) remedy, and proceed to rewrite the plan under the guise of providing the participants "equitable" relief pursuant to section 1132(a)(3)(B). Thus, the question before this Court, and which Randalls' response fails to address, is which remedy ERISA requires. As this case graphically illustrates, the difference can dramatically affect the administration of ERISA plans. Therefore, resolving this issue would decide a substantial conflict regarding this important federal statute.

B. Randalls' brief illustrates the conflict that should be resolved by this Court.

Randalls' Brief in Opposition illustrates the importance of the conflict before the Court. Unable to find any authority to support using illegal terms to deny a claim for benefits, Randalls simply argues (without authority) that the illegal terms themselves (which it refers to as the "strict" or "literal" terms) preclude a claim for benefits. Randalls cites no authority holding that illegal terms can themselves preclude a claim under section 1132(a)(1)(B). Having assumed (without authority) that the illegal terms preclude such a remedy, Randalls turns to the merits of equitable relief. Randalls' arguments lack merit, but this is not the time to address them.

The important issue to be decided is the effect to be given to illegal forfeiture provisions in an ERISA protected plan. If employers are allowed to preclude claims for specific benefits by simply inserting illegal forfeiture provisions into ERISA plans, as the Fifth Circuit holds, the result is to allow employers to write the subsection 1132(a)(1)(B) remedy out of ERISA by adding illegal conditions to their plans and relegating employees to "equitable" relief under subsection 1132(a)(3)(B). If, on the other hand, illegal terms in ERISA plans are void, as the Third Circuit holds, petitioners have a subsection 1132(a)(1)(B) remedy that must be recognized. To say that petitioners have no claim for benefits because their ERISA plan contained illegal terms is to say that the illegal provisions will be enforced. If the law of the land is that claims for benefits can be defeated merely be inserting illegal provisions into ERISA plans, such a pronouncement should come in the form of an explanatory opinion from this Court, not a per curium affirmation of a district court memorandum opinion that itself lacks explanation on this point.

There is no merit to Randalls' attempt to minimize this issue's importance by arguing that this is the first reported case where section 1104(a)(1)(D) has been raised in a failed top hat plan case. The issue has broader ramifications for all cases where ERISA plans have illegal terms of any type. As the numerous cases petitioners cited in their petition demonstrate, section 1104(a)(1)(D) arises frequently in a variety of contexts. Yet only the Fifth Circuit holds that the section does not apply in the face of illegal plan provisions.

C. The petitioners' damage calculations do not produce unreasonable results.

Although the merits are not presently before the Court, there are three points that petitioners address briefly here to dispel the false impression Randalls attempts to create that petitioners seek unreasonable results.

One, Randalls suggests that the illegality with the MSP was that it had no ratable accrual and vesting schedules that satisfied ERISA. This is not true. The illegality was that the MSP provided for the complete non-accrual, non-vesting and forfeitability of benefits up to a participant's 65th birthday (Agreed Exhibit 3, ¶¶ 4.4, 4.5).

Two, petitioners do not ask for benefits that would have accrued to them after plan termination. Instead, the benefits petitioners seek in their section 1132(a)(1)(B) claim are the present value of the specific retirement benefits promised in their most recent plan agreements and benefit statements (Agreed Exhibit 138, Tab B). Randalls does not dispute that the MSP specified these benefits. Randalls even stipulated to the amounts (38 R. 3976-95). The present value of the participants' promised benefits is not the same thing as the benefits that would have accrued to them in the future, as Randalls' suggests. *See* Respondent's Brief at 15. Instead, the participants' stated benefits increased each year as their compensation grew (39 R. 9551). For example, Joe Carrabba was a MSP participant for its entire existence. In 1974, his MSP retirement benefits were $31,200 (Agreed Ex. 1). By 1992, those benefits had increased to $519,720 (39 R. 9381). At the same progression of benefit increases, Mr. Carrabba's retirement benefits would have increased to

$872,540 at age 65. Petitioners are not seeking $872,540 or even the present value of $872,540 for Mr. Carrabba. Rather, they are seeking the present value of the $519,720 less those amounts already paid to him at plan termination, for a net recovery of unpaid benefits of $186,887 (Agreed Ex. 183, Tab B). Petitioners do not, therefore, seek any benefits based on years not worked.

Three, Randalls' complaints that participants' stated benefit amounts are irrational because some younger employees have higher promised age 65 benefits than some older employees are unfounded. Randalls' Brief at 10. The participants' promised benefit amounts are a result of the plan's insurance driven nature, not any calculation by petitioners, as Randalls claims (39 R. 9551). Thus, any "irrational" results tied to the amount of promised benefits result from the benefit calculation method Randalls used in its "retirement insurance program" (Agreed Ex. 15). For example, Randalls complains that the $915,889 of promised benefits for Julie Embree (a 27 year old pharmacist) is unreasonable. It is, however, nothing more than the amount of her retirement benefit calculated by Randalls and stated on her most recent plan agreement, as Randalls stipulated (38 R. 9382). The differences in the promised retirement benefits are a function of each particular participant's salary and age (39 R. 9551). Moreover, petitioners made the present value calculation consistently for each participant thereby resulting in substantially smaller benefits due at plan termination for the younger employees (Agreed Ex. 138, Tab B).

CONCLUSION

Because the Fifth Circuit's holding conflicts with the Third Circuit's holding on this critical issue under an important federal statute – and violates critical ERISA principles this Court has affirmed – the petition for a writ of certiorari should be granted.

Respectfully submitted,

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